TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 35.

PATRICK COLLINS, PLAINTIFF IN ERROR

vs.

THE COMMONWEALTH OF KENTUCKY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

FILED MAY 27, 1911.

(22,707)

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a United States Supreme Court.

PATRICK COLLINS, Appellant,
vs.
COMMONWEALTH OF KENTUCKY, Appellee.

Statement.

This is an appeal from a judgment of the Court of Appeals of Kentucky, rendered on the 13th day of January, 1911, and found on page- 56*a*, 57, 58, 59, 60, 61, 62, 63, and 64 of the record herein, and judgment overruling petition for re-hearing found on page 69 of the record, rendered on the 15th day of March, 1911 by said court. The writ of Error attached to and as part of the record herein, and found on page 74, having been allowed by Honorable J. P. Hobson, Chief Justice of the Court of Appeals of Kentucky on April 29, 1911. Assignment of Error on page 71, and original citation on page 78, which judgment of the Kentucky Court of Appeals, this court is respectfully asked to reverse.

E. T. WORTHINGTON,
W. D. COCHRAN,
J. M. COLLINS,
Attorneys for Appellant, Patrick Collins,
Maysville, Ky.

HON. JAMES BREATHITT,
Att'y Gen. State Ky.,
Att'y for Appellee, Frankfort, Ky.

1 THE COMMONWEALTH OF KENTUCKY:

The Court of Appeals.

PATRICK COLLINS, Appellant,
vs.
COMMONWEALTH OF KENTUCKY, Appellee.

Appeal from Mason Circuit Court.

Pleas Before the Honorable the Court of Appeals of Kentucky, at the Capitol, in Frankfort, on the Dates Hereinafter Mentioned.

2 Be it remembered that on the 5th day of November, 1910, the appellant, by his attorney, filed in the office of the Clerk of the Court of Appeals, a transcript of the record, and which is in words and figures as follows:

3 Kentucky Court of Appeals.

PATRICK COLLINS, Appellant,
vs.
COMMONWEALTH OF KENTUCKY, Appellee.

Statement on Appeal.

The names of the parties to this appeal are as stated in the above caption.

The judgment appealed from was rendered by the Mason Circuit Court on September 7, 1910, at the regular September term of said Court, and may be found on page 6 of the accompanying transcript.

Appeal was prayed and granted in Court below. (See page 7 of transcript.)

Appellant resides in Mason County, Ky. The post office address of appellee's attorney is M. J. Henessey, Augusta, Bracken County, Ky., Commonwealth's Attorney, 19th District of Kentucky.

WORTHINGTON & COCHRAN,
J. M. COLLINS,
Attorneys for Appellant.

4 STATE OF KENTUCKY,
Mason Circuit Court:

Pleas Had Before the Honorable Chas. D. Newell, Judge of the Mason Circuit Court, at the Court House Thereof, in the City of Maysville, Ky., on the 8th Day of September, 1910.

Mason Circuit Court.

THE COMMONWEALTH OF KENTUCKY, Plaintiff,
against
PATRICK COLLINS.

Indictment for Unlawfully, &c., Selling and Disposing of a Crop of Pooled Tobacco, &c.

Be it remembered, that heretofore towit: on the 31st day of March, 1909, the Grand Jury of Mason County, returned into court the following indictment, endorsed on the back thereof "The Commonwealth of Kentucky against Patrick Collins" Indictment for unlawfully & knowingly selling and disposing of a crop of pooled tobacco without the consent of the authorized agent selected to sell same," A true bill, John M. Chambers," Foreman, which was ordered to be filed, and is in the following words towit:

Indictment.

The Grand Jury of Mason County in the name and by the
5 authority of the Commonwealth of Kentucky, accuse Patrick Collins of the offense of unlawfully and knowingly selling and disposing of a crop of pooled tobacco without the consent of the authorized agent to sell and dispose of same, committed as follows:

The said Patrick Collins, on the — of ——, 1909, and other days before and since within eight months last past, and before the finding of this indictment in the County aforesaid, did unlawfully and knowingly sell and dispose of a crop of pooled tobacco, to-wit: about 14000, pounds of tobacco grown in the year of 1907, by Patrick Collins on the farm of said Collins in said Mason County, by then and there moving taking and shipping said tobacco out of said Mason County, to some place or point unknown to the grand jury, and there selling and unlawfully disposing of same to some person, firm or corporation unknown to the Grand Jury, said purchaser not being authorized by the written consent of the agent selected to sell same, to purchase said tobacco, and which said crop of tobacco was then and there at the said time of said removal, shipping sale and disposal, pooled tobacco having been prior thereto regularly, consigned to the Burley Tobacco Society, a corporation organized and doing business under the laws of the State of Kentucky, and to the Mason County Board of Control, the authorized agent for said Society, for said Mason County, a corporation organized and existing under the laws of the State of Kentucky,
6 (said corporations doing business under an Act of the General Assembly, of Kentucky permitting, persons to pool their wheat, tobacco crops and other products, and sell same as a whole, and making said contracts in pursuance thereof valid) for the purpose of receiving, holding, grading and selling, and disposing of said crop of tobacco, by said Patrick Collins, who then and there at said times, with other persons, signed and entered into the following written agreement, to wit;

Know all men by these presents, That whereas the Burley Tobacco Society (a branch of the American Society of Equity) and the Mason County Board of Control, have been organized and corporated under the laws of the State of Kentucky, for the purpose of assisting the growers of Burley Tobacco to realize for their tobacco fair and remunerative, prices:

Therefore to co-operate, with and to assist, said organization to accomplish their purpose, and in consideration of the benefits, to be derived from having our tobacco handled by said Board of Control, as contemplated by its charter, and sold by said Tobacco Society; we the undersigned growers of and owning the number of acres of burley tobacco now growing on our respective farms as hereinafter stated, and to be raised during the year 1907, do hereby consign to said Burley Tobacco Society, our respective crops of tobacco, and do hereby constitute said Society our agent, for the purpose of receiving, grading and selling the same on such terms as said Society
may prescribe, in accordance with its charter and by-laws:
7 Provided said Society shall not sell or otherwise dispose of any of said tobacco, for less than fifteen cents per pound for

an average crop grown in the year of 1907. For the purpose *of* as hereinbefore set out, the title to said tobacco, is hereby vested in said Society. Signed, Patrick Collins, 14 acres," and the said Collins, by said pooling contract above set out pooled, pledged, and signed said tobacco crop to and with said Burley Tobacco Society, and Mason County Board of Control, the said Collins being at the time thereof, a party to and interested in a pool, combine and agreement, with numerous persons, for the purpose of pooling their tobacco crops and securing better prices, for same and the members of said pool, and said Collins had prior, to said sale and disposal, in consideration of benefits to be obtained, legally selected said Society, and Board of Control, their and his agent for the purpose aforesaid, to sell and dispose of said crop of tobacco, and said tobacco was then and at the time, of said sale and disposal in such pool and under supervision and control of said corporations, as above stated by the signing of said pooling contract by said Collins, as aforesaid, and which by its terms prohibited the sale or disposal of said tobacco, without the consent of said Agent and the said Collins, did unlawfully, sell and dispose of said crop of tobacco as aforesaid
8 against the will and without the consent either written or verbal of said authorized agent or agents, or either of them, with the intent to violate said pooling contract, and to defraud said Society, and Board of Control, contrary to law and against the peace and dignity of the Commonwealth of Kentucky.

M. J. HENNESSEY,
Commonwealth's Att'y.

(At a court begun and held for the Mason circuit court on the 31st day of March, 1910.)

Order.

Ordered that a Bench Warrant issue for the arrest of the defendant and that he be allowed to give bail in the sum of One Hundred Dollars.

Bench Warrant.

THE COMMONWEALTH OF KENTUCKY:

To any Sheriff, Coroner, Jailer, Marshal/, or Policeman in this State:

You are hereby commanded forthwith to arrest Patrick Collins, and bring him before the Mason Circuit Court, to answer an indictment in that court against him for. Unlawfully, and knowingly selling and disposing of a crop of pooled tobacco, without consent of the authorized agent, &c., or if the court be adjourned for the term, that you deliver him to the Jailer of Mason County.

Given under my hand as Clerk of said Court, this 31st day of March, 1909.

ISAAC WOODWARD,
C. M. C. C.

9 *Sheriff's Return.*

Executed April 6th, 1909, by arresting Patrick Collins, and taking his bond, with J. M. Collins security for his appearance the 1st day of the next September term, of the Mason Circuit Court, said bond is returned herewith.

JAMES MACKEY, *S. M. C.,*
By J. H. CLARK, *D. S. M. C.*

Bond.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
PATRICK COLLINS, Defendant.

Bond.

Patrick Collins being is custody, charged with the offense of Unlawfully and knowingly, selling and disposing of a crop of pooled tobacco, without consent of authorized agent, and being admitted to bail in the sum of One Hundred Dollars, now we Pat Collins, principal and J. M. Collins, security, of Mason County, Kentucky, hereby undertake that the above named Patrick Collins, will appear in the Mason Circuit Court on the first day of its next September term to answer said charge, and will at all times render himself amenable to the orders and process of said court, in the prosecution of said charge, and if convicted will render himself in execution thereof, or if he shall fail to perform either of these conditions that we will pay to the Commonwealth of Kentucky, the sum of One Hundred Dollars.

Witness our hands this 6th day of April 1909.

PATRICK COLLINS.
J. M. COLLINS.

10 Taken and subscribed before me as Sheriff of Mason County.

JAMES MACKEY,
Sheriff Mason County,
By J. H. CLARK,
D. S. M. C.

(At a court held as aforesaid on the 7th day of September 1910.)

Order Filing Demurrer.

The defendant produced his demurrer to the indictment herein which is ordered to be filed.

Demurrer.

Defendant Patrick Collins, demurs to the indictment herein on the grounds:

1. Same does not state facts sufficient to constitute an offense committed by defendant.

2. The facts alleged show that the alleged offense, if any, was committed outside the jurisdiction of this court.

3. The Statutes of Kentucky under which this indictment is brought are in conflict with and in violation of the Fourteenth Amendment of the Constitution of the United States, in that same deprives this defendant of the equal protection of the laws, and also of his liberty and property without due process of law, and also in violation of the Interstate Commerce clause of the Constitution of the United States, and the Sherman Anti-trust Act.

WORTHINGTON & COCHRAN,
J. M. COLLINS, *Att'ys for Def't.*

11 *Order Overrule Demurrer.*

The court having considered of defendant's demurrer to the indictment and being advised, overrules the same to which defendant excepts.

Order Empaneling Jury, &c.

This day came the defendant and pleaded not guilty to the indictment and thereupon came the following jury viz: Pearl Blythe, G. W. Rudy, W. J. Soward, W. H. Craeraft, Chas. J. Collins, H. B. Butcher, W. W. Scott, W. J. Wilson, Edward Rubenacker, J. S. Pogue, Holman Bouldin, and Edward Kennard, who were duly empaneled and sworn to try the issue, and at the conclusion of plaintiff's testimony, the defendant moved the court to instruct the jury to find the defendant not guilty, and the court having considered thereof overrules the same, to which defendant excepts, and the jury aforesaid having fully heard the evidence returned the following verdict: "We the jury find the defendant guilty and fix his punishment at One Hundred and Fifty Dollars' fine."

J. S. POGUE, *Foreman.*

Judgment.

Wherefore it is adjudged by the court that the plaintiff recover of the defendant the sum of One Hundred and fifty Dollars, and the costs of this prosecution and that the defendant be confined in the jail of Mason County, until the fine aforesaid shall be paid but the period of such confinement, for the non-payment of the
12 fine shall not exceed one day for each two dollars of said fine.

(At a court held as aforesaid on the 8th day of September, 1910.)

Motion for New Trial.

The defendant moves the court to set aside the verdict and judgment herein and grant a new trial of this action and produced his reasons in writing therefor, which are ordered to be filed.

Motion and Grounds for New Trial.

Now comes the defendant, Patrick Collins, and moves the court to set aside the verdict and judgment herein, and grant him a new trial in this cause for the following reasons:

1. Because the verdict is against the law and contrary to the evidence.

2. Because the court mis-instructed and refused to properly instruct the jury.

3. Because the verdict of the jury shows that it is the result of passion and prejudice, by reason of which the defendant has not received a fair and impartial trial.

4. Because the court should have sustained the motion of defendant to peremptorily instruct the jury to find for defendant, which action of the court was error.

5. Because there is no evidence in this cause on which a jury could find the defendant guilty.

6. Because of the admission of testimony irrelevant and improper which was objected to at the time by the defendant, and be-
13 cause of the refusal to admit testimony for the defendant, which should have been admitted. And for all other reasons apparent upon the face of the record.

WORTHINGTON & COCHRAN,
J. M. COLLINS, *Att'ys for Def't.*

(At a court held as aforesaid on the 4th day of October, 1910.)

Order Overruling Motion for New Trial.

The court having considered of defendant's motion and grounds for a new trial of this action, and being advised, overrules the motion to which defendant object- and excepts, and prays an Appeal to the Court of Appeals, which is granted upon condition, that he lodge in the Clerk's office of said Court, a transcript of the record in sixty days from date of Judgment.

(At a court held as aforesaid on the 6th day of October, 1910.)

Order Tender- Bill of Exceptions.

The defendant produced and tendered to the court his certain, Bill of Exceptions, herein and moved the court to sign and seal same and make it a part of the record, and on motion of plaintiff further time is given him to examine and complete same.

(At a court held as aforesaid on the 10th day of October, 1910.)

14 *Order Filing Bill of Exceptions.*

The defendant Patrick Collins having on a former day of this term, tendered his Bill of Exceptions, together with a transcript of the evidence herein, and moved the court to file same and same having been duly examined and approved, it is now ordered to be filed, and is signed by the court.

Said Bill of Exceptions and transcript of Evidence are as follows:

Mason Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
PATRICK COLLINS, Defendant.

Bill of Exceptions & Transcript of Evidence.

Be it remembered that at the September 1910 term of the Mason Circuit Court, the above styled cause came up to be heard and plaintiff to support the issues on its part, introduced the following witnesses:

First, the witness S. A. SHANKLIN, who having been first duly sworn testified as follows:

Direct examination by M. J. HENNESSEY:

Q. 1. Mr. Shanklin, what official position do you occupy with the Burley District Society, and the Mason County Board of Control?

A. I am precinct chairman of the Mason County Board
15 of Control, and a member of the executive board in the Burley District Society.

Q. 2. What position did you occupy in the fall of 1908, November and December and during that summer?

A. I was County chairman of the Board of Control.

Q. 3. Are you acquainted with the defendant Patrick Collins?

A. Yes sir.

Q. 4. The Burley District Society, is that a corporation?

A. Yes sir.

Q. 5. How about the Mason County Board of Control?

A. It is incorporated also.

Q. 6. What relation did the Mason County Board of Control bear to the Burley District Society?

A. It is just one part of it. All the Counties are represented and Mason County is just one county that composes the District Board.

Q. 7. In 1908, what crop was pooled in this county?

A. None in 1908.

Q. 8. No tobacco was grown that year?

A. No sir.

Q. 9. Was there not a tobacco crop; was not the 1907 held in the pool?

A. The 1907 crop was then being prized and handled.

Q. 10. When was the 1907 crop pooled up?

A. In 1907 the year it was grown.

Q. 11. Was there a pool in Mason County of the 1907 crop by the majority of the farmers of that pool?

A. Yes sir.

16 Q. 12. Was Patrick Collins' crop pooled in that pool?

A. Yes sir.

Q. 13. How many acres?

A. I think fifteen to the best of my knowledge.

Defendant objects to the question: the Court overrules the objection, to which defendant excepts.

Q. 14. Do you know whether or not the Mason County Board of Control, and the Burley District Society, ever gave Patrick Collins their consent to sell his crop of tobacco which was in the 1907 pool?

A. Not to my knowledge.

Q. 15. Would you have knowledge of any written contract if it had been given?

A. Yes sir, I would have had to sign it.

Q. 16. You say you would have had to sign it?

A. Yes sir.

Q. 17. Then there was no written consent given to selling this crop by him?

A. No sir.

Q. 18. Now Mr. Shanklin, was the tobacco in the 1907 pool delivered and sold that is the Mason County tobacco?

A. Yes sir.

Q. 19. Were the books all closed on the 1907 pool?

A. Defendants object to the question.

Q. 20. Was the tobacco pooled by Mr. Collins ever delivered to the Mason County Board of Control or the Burley District Society?

17 Defendant objects to the foregoing question; the court overrules the objection to which defendant excepts.

A. Not to my knowledge.

Q. 21. Isn't it a fact you know it wasn't delivered?

A. Yes sir.

Attorney for plaintiff here offers to introduce in evidence the pooling contract. (See pages 18 and 19.)

Q. 22. This tobacco was pooled was it or not pooled by the tobacco growers of Mason County, and did the Mason County Board appoint agents for the purpose of grading that tobacco, for the purpose of obtaining better prices?

Defendant objects to the question: the court overrules the objection to which defendant excepts.

A. Yes sir.

Q. 23. Are the gentlemen on the other side willing to consider this contract a part of the evidence?

By Mr. COCHRAN: We are.

Q. 24. After Mr. Collins' tobacco was signed, did you ever have a conversation with him in regard to the delivery of that tobacco?

A. Yes sir.

Q. 25. What was it?

A. I went out to see Mr. Collins, and asked him to bring it in.

Q. 26. How did you come to go out there?

A. It was reported Mr. Collins, did not want to bring it in
18 and I wanted to talk with him and get him to bring it in.

Q. 27. Was it not late to bring in tobacco at that time?

A. Yes sir.

Q. 28. Had notice been given to members of the pool to bring in tobacco?

A. Yes, sir.

Q. 29. How was it given?

A. Through the papers.

Q. 30. Had Mr. Collins been given notice?

A. Yes sir, through the County papers.

Q. 31. Was that notice published in the county papers?

A. Yes sir.

Defendant object- to the foregoing question and answer. Court overrules the objection, to which the defendant excepts.

We the undersigned for and in consideration of the benefits to be derived from having our tobacco handled and sold by the Burley Tobacco Society, a branch of the American Society of Equity, do hereby pledge to the said Society the number of acres of tobacco set opposite our names, raised during the season of 1907, which constitutes our entire crops, and constitute it our agent for the purpose of receiving, grading, handling and selling the same on such terms as the Society may prescribe in accordance with its charters and by-laws.

Provided: The said Society shall not sell or otherwise
19 dispose of any of said tobacco for less than the minimum price of 15 cents per pound for an average crop.

Name.	Post-office.	County.	Acres.
Robert Scott	Manchester, O.	Adams.....	3-1906
W. J. Oberschlake	do.	"	3-1907
		"	5-1906
			10-1907
Pat Collins	Mill Creek	Mason.....	15
E. R. Lalley	" "	"	4.

NOTE.—Any person or persons having a crop of tobacco raised in 1906, not now pledged to the Burley Tobacco Society, may pledge the same to said Society, Provided he or they also pledge his or their crop of 1907, tobacco to the said Society.

20 Q. 32. This conversation you had with him was after the notice had been published in the county papers?

A. Yes sir.

Q. 33. Tell what the conversation consisted of?

By J. M. COLLINS: Fix the time.

A. I cannot fix the time, but the place was at his house. One evening as I was going out from Maysville, I cannot fix the exact date I went out to see him, and asked him to bring the tobacco in and he said he didn't like the way our Warehouse Company was doing and he said he didn't know what to do about it, and I told him to go and see our President and make arrangements with him and that would be all right as the Board of Control had made a contract with the Warehouse Company, and he wanted the tobacco delivered and to have it handled.

Q. 34. Who was the President referred to?

A. J. N. Kehoe, President of the Mason County Warehouse Company.

Q. 35. Was there anything else said in that conversation?

A. No sir, I believe nothing of any particular moment.

Q. 36. That conversation took place after this notice had been given?

A. Yes sir some little while.

Q. 37. Did you ever have any talks with him after that in regard to that tobacco?

A. No sir.

Q. 38. Were you ever out there?

A. No sir.

21 Q. 39. And you do not know of your own personal knowledge what became of it?

A. No sir.

Q. 40. Did or not Mr. Pat Collins at any time deliver to the Mason County Board of Control or any one concerned with the Equity Society or Warehouse Company, any part of the 1907 crop of tobacco, which he had pooled?

A. No sir.

Q. 41. Has he up to this time?

A. No sir.

And further saith not B. A. Shanklin.

The witness MARK COLLINS, having been first duly sworn testified as follows:

Q. 1. Are you a son of Pat Collins defendant?

A. Yes sir.

Q. 2. In 1907 did you help your father in raising a crop of tobacco on his place?

A. Yes sir.

Q. 3. How many acres did you raise?

A. I do not know, we were not raising it all ourselves; we had tenants.

Q. 4. How much tobacco did you raise on your own place?

A. I do not remember just how many acres, I could not say.
Q. 5. Could estimate how many acres?
A. No, I hav'n't any idea.
Q. 6. Did you raise as much as ten acres?
22 A. Yes as much as that.
Q. 7. As much as fifteen acres?
A. I won't say.
Q. 8. To the best of your recollection, was it about fifteen acres?
A. I won't say as I am not certain about that. We raised different amounts each year and I never keep track of it.
Q. 9. Who was the tenant on your father's place?
A. A colored man.
Q 10. What is his name?
A. Williams.
Q. 11. What is his first name?
A. James.
Q. 12. Do you know how much tobacco he raised that year on your father's place?
A. No, but he had a small patch.
Q. 13. As much as four or five acres?
A. I judge something like that.
Q. 14. And your father got half of that?
A. I do not know about that.
Q. 15. About what — did you cut that 1907 crop and where did you house it?
A. About the usual time for cutting tobacco, and we housed it in our own barn.
Q. 16. Where did you house that tobacco and when?
A. I do not know just when.
Q. 17. Did you prize it yourself out there?
A. Some of the folks did but I had nothing to do with it.
23 Q. 18. Where did they prize it?
A. At home.
Q. 19. In 1908, or was it the next year?
A. I do not know, I could not say when it was, for I do not remember.
Q. 20. That tobacco prized at home was kept in your barn?
A. Yes sir.
Q. 21. Did you help remove the tobacco from that barn?
A. Yes sir.
Q. 22. Who helped you?
A. I do not remember.
Q. 23. Wasn't that along in the fall of 1908?
A. No sir.
Q. 24. When was it?
A. That was some time in February.
Q. 25. February of what year?
A. 1908.
Q. 26. Where did you move it to?
A. It was loaded on a car.
Q. 27. Where?

A. At Millcreek Station.
Q. 28. Where did you ship it to?
A. I could not say.
Q. 29. Did you hear your father say where he shipped it to?
A. I do not think I did.
Q. 30. You and your father and brother talked about the tobacco didn't you?
A. I didn't pay much attention to it.
24 Q. 31. Did you have any part of that tobacco coming to you for raising it?
A. Only my living, that is all I looked at.
Q. 32. When did you take that tobacco to Mill Creek Station?
A. If I remember right, but I won't say for sure, it was the third day of February 1909, no, 1908.
Q. 33. Do you remember when you hauled it, was it in day time or night time?
A. In broad day light.
Q. 34. How many hogsheads were there?
A. Eleven hogsheads.
Q. 35. What car did you put it on at the L. & N., and where was it billed?
A. I could not tell you.
Q. 36. Do you know whether it was an L. & N. or C. & O. car?
A. I do not know.
Q. 37. What railroad was it on?
A. The L. & N.
Q. 38. Which way was the tobacco going, or the train going, by way of Maysville or going up to Paris?
A. It was headed towards Paris when we loaded the tobacco.
Q. 39. Have you ever seen any — that tobacco since?
A. I do not know that I have.
Q. 40. Do you know that you have not?
A. I could not say I have not.
Q. 41. Do you know what the tobacco brought, did your father ever tell you?
A. If he did I have forgotten.
25 Q. 42. Did your father ever say he had sold it?
A. I do not know as he did, he never came right out and told me.
Q. 43. Didn't he say he had sold it, isn't that the fact?
A. I do not know.
Q. 44. What did he say if anything in regard to that tobacco?
A. I never remember of anything that far back.
Q. 45. Did your father ever say to you where it had been sold?
A. He may have, but we have shipped tobacco to Louisville, and Cincinnati, and different places and I never paid any attention to it.
Q. 46. Don't you know as a matter of fact where this tobacco did go, from what your father said?
A. No sir, I could not swear that I know.
Q. 47. Did your father ever say?
A. I guess he did.

Q. 48. What is your best recollection of what he said in regard to where it was gone?
A. I cannot say whether it was Cincinnati or Louisville.
Q. 49. But it must have been one or the other?
A. I suppose so.
Q. 50. Did he ever say to whom he shipped to?
A. No- as I know of.
Q. 51. Or how much he got for it?
A. I might have heard him say, but I cannot remember.
Q. 52. Who was present when this tobacco was put on the cars, who helped bring it over that day?
26 A. Several of them.
Q. 53. Was your bother John one?
A. Yes sir.
Q. 54. Who else?
A. I cannot begin to name them all, there was some six or eight.
Q. 55. Who can you remember?
A. Most of them were colored men.
Q. 56. Give the names of those you can remember?
A. I remember one name- Walter Turner.
Q. 57. Who else?
A. Mr. Grimes, Lee Grimes.
Q. 58. Who else?
A. Mr. Mike Walton.
Q. 59. Is that all you can remember?
A. And myself.
Q. 60. And your father, was he around there?
A. Yes sir.
Q. 61. Do you know what railroad was there at the time? was Riley Gaither agent there?
A. No sir.

And further saith not Mark Collins.

The witness JOHN COLLINS, having been first duly sworn, testified as follows:

Q. 1. Do you know whether or not your father's tobacco crop of 1907 was pooled?
27 A. I could not say but I think it was.
Q. 2. Did you ever hear him say anything about it?
A. Yes sir.
Q. 3. You knew from him it was pooled?
A. Only by what he said was all.
Q. 4. Where was that tobacco prized?
A. At home.
Q. 5. This pooled tobacco?
A. Yes sir.
Q. 6. About how many hogsheads were there?
A. About eleven.
Q. 7. Where did you haul this tobacco?
A. Millcreek.

Q. 8. Do you know about how many pounds there was to the hogshead, on an average?

A. I could not say.

Q. 9. Do you know where the tobacco went to?

A. Cincinnati I think.

Q. 10. Where did you get that information, was it from your father?

A. No by the bill, by the marks on the hogshead, I mean, I didn't see the bills.

Q. 11. Do you know where they were billed to?

A. No sir, Cincinnati, I think, but I do not know what house.

Q. 12. Did you know from your father at any time what he got for this tobacco?

A. I have heard him say but I do not remember.

28 Q. 13. What is your best recollection, about how much a pound?

A. I haven't much of an idea about that.

Q. 14. But you had heard from him what he got for it in round numbers?

A. Yes sir.

Q. 15. About how much was that?

A. I do not know as I heard him say that.

Q. 16. Do you know how long it was after that tobacco was shipped that your father got his receipts for the sale of it?

A. No sir.

Q. 17. Do you remember when it was shipped?

A. Sometime during the first ten days of February 1908.

Q. 18. This referred to which your father had in the pool, was raised on your father's farm in Mason County wasn't it?

A. I could not say.

Q. 19. The bulk of it?

A. No sir we had some there we had bought.

Q. 20. In this tobacco?

A. No, but it was all there.

Q. 21. I am talking about the Equity tobacco that was raised on your father's farm in Mason County?

A. Yes sir.

Q. 22. And this tobacco we have reference to is the tobacco shipped out of Mason County to Cincinnati?

A. Yes sir.

29 Cross-examination by J. M. Collins:

Q. 1. Do you know the time the tobacco was shipped?

A. The first ten days of February 1908.

Q. 2. 1908 or 1909?

A. 1909, it was last year.

And further saith not John Collins.

The witness RILEY GAITHER, having been first duly sworn testified as follows:

Q. 1. Were you agent for the L. & N. Railroad Company during the year of 1909?
A. No sir.
Q. 2. During the year 1908?
A. No sir.
Q. 3. What were you doing out there?
A. I worked at Marshall, I am not the agent though.
Q. 4. Do you know anything about the shipment of Mr. Collins' tobacco along in February 1909?
A. No sir.
Q. 5. Do you know anything about that?
A. No sir.

And further saith not Riley Gaither.

The witness LEE GRIMES having been first duly sworn, testified as follows:

Q. 1. Did you assist in taking the tobacco you have heard the boys testify in regard to — the railroad?
30 A. No sir.
Q. 2. You didn't help haul that tobacco?
A. No sir I didn't.
Q. 3. Did you work for Mr. Collins at any time that year?
A. I did not.
Q. 4. In February 1909?
A. I did not.
Q. 5. Who were you working for at that time?
A. Mike Walton.
Q. 6. Did you help Mike Walton load tobacco there?
A. No sir, I was working for Mike Walton and I went over to the Station to help unload tobacco.
Q. 7. Whose tobacco was it?
A. Mr. Collins'.
Q. 8. And he and his boys were there?
A. Yes sir.
Q. 9. And you helped them unload?
A. Yes sir.
Q. 10. Did Mr. Collins say where the tobacco was going?
A. He didn't.
Q. 11. What railroad men were there, if you remember?
A. I do not know any railroad men myself.

Cross-examination:

Q. 1. You have seen them load tobacco often at Mill creek?
A. I have so.

And further saith not Lee Grimes.

31 The witness JOHN CLARK, having been first duly sworn, testified as follows:

Q. 1. Did you ever have a conversation with Mr. Pat Collins in regard to his pooled tobacco, the 1907 crop?
A. Yes sir.
Q. 2. Where did that conversation occur?
A. I had one conversation with him here on the streets of Maysville right there at the corner of J. J. Wood. He was prizing his tobacco and invited me over to look at it, and I went over in a few days, and looked at it in the barn. He had it in hogsheads when I was there and he had the samples out corresponding with each hogshead, he said.
Q. 3. Do you remember when that was about?
A. I do not remember when it was, but it was a right cool morning.
Q. 4. Do you remember the year, whether it was in 1908 or the winter of 1909, the forepart of 1909.
A. I would be afraid to say.
Q. 5. What was the result of the conversation then?
A. He priced me the tobacco.
Q. 6. And he told you at that time it was Equity tobacco?
A. Yes sir, he said it was equity tobacco signed up.
Q. 7. How many hogsheads?
A. Ten or eleven is my best recollection.
Q. 8. You didn't buy it though?
A. No sir, I could not make a deal with him on it.
Q. 9. Wasn't the understanding if you did buy it, that you
32 were to buy it and keep it in the pool?
A. Yes sir, I made him an offer on it provided the samples were up with each hogshead and the samples down here in *down*.

Cross-examination by J. M. COLLINS:

Q. 1. He tried to sell it to you in the pool?
A. Yes sir.
Q. 2. He tried to sell it to you to keep it in the pool?
A. That was the understanding.
Q. 3. And you tried to buy it but could not agree on a price?
A. Yes sir.
Q. 4. It had been the custom generally, in the county to ship tobacco to Louisville and Cincinnati, hasn't it?
A. Yes sir, the tobacco that was signed up in the Equity.
Q. 5. A lot of tobacco was sent to Louisville that was in the Equity, isn't that so?
A. Not to my knowledge.
Q. 6. Was any shipped which was sold out of the different counties?
A. Not out of this County that I know of.
Q. 7. Didn't Mr. Scott Osborne ship Equity tobacco that way?
A. I do not know whether he did or not.
Q. 8. You are not acquainted with that fact?

A. No sir, I could not say.

Q. 9. Do you know anybody else that did that?

A. No sir.

Q. 10. Was Mr. Scott Osborn's tobacco handled by the
33 Maysville Warehouse Company?

A. I could not tell you.

Q. 11. Don't you know it wasn't handled by the Maysville Warehouse Co.?

A. No.

Q. 12. There was tobacco here in Mason County, not handled by the Maysville Warehouse Company, wasn't there?

A. I do not know.

Q. 13. Were you not close enough to the situation to know that?

A. No sir.

Q. 14. How about the tobacco on Jersey Ridge and Tuchahoe, and that neighborhood, did it all go through the Maysville Warehouse Company that year?

A. It went through some of these warehouses, because I had a good deal put there myself.

Q. 15. The 1906 and 1907 crops?

A. No sir, the 1909.

Q. 16. It is the 1907 we are talking about now, that year there was a good deal of tobacco in that neighborhood, not handled by the Maysville Warehouse Company?

A. It was put at Dover is my understanding, it is all handled by the same firm.

Q. 17. Wasn't it handled by Mr. Scott Osborne, individually, and other men down there and not at all by the Maysville Warehouse Co.?

Plaintiff objects to the question; the court sustains the objection, to which defendant excepts.

34 And further saith not John Clark.

This was all the testimony offered by the Commonwealth.

Defendant then moved the court to find the defendant not guilty to which plaintiff objects, which motion the court, after taking it under advisement, overrules, to which ruling defendant excepts.

Defendant then produced PATRICK COLLINS who testified as follows:

Q. 1. You are the defendant in this case?

A. Yes, sir.

Q. 2. Where do you live?

A. I live near Millcreek station eleven miles from Maysville on the L. & N. Railroad.

Q. 3. Were you ever engaged in the tobacco business? in selling leaf tobacco?

A. Yes, sir, quite largely from 1900-1902-1903 until 1904, the tobacco became involved and I am afraid to handle it any longer.

Q. 4. In the spring of 1907 did you plant a crop of tobacco?

A. Yes, sir, I planted a crop in the year of 1907.

Q. 5. How many acres?

A. Ten or eleven acres, I intended to put in fifteen or sixteen that year, but afterwards made arrangements to handle tobacco in Cincinnati and Louisville, and I wasn't at home much of the season, but I put in about six acres myself and my colored tenant put in
35 five, and we had about eleven acres of tobacco I judge.

Q. 6. Was that all the tobacco planted on your farm in that year?

A. Yes, sir, that was all the tobacco planted.

Q. 7. Did you buy any tobacco outside that year?

A. Yes, sir, several crops outside of what I had there at home and outside of what I raised at home myself. Long afterwards in May probably or the latter part of April, I rented two or three acres of ground on another farm and had intended raising tobacco there and I had that raised on the other place and it was in another barn during the fall. There was about 3300 pounds of tobacco not raised on the place or included in the pool. It was 3300 pounds in winter weight but I do not know what it would weigh in summer weather because there was some waste, but in the winter it weighed 3300 and some odd pounds.

Q. 8. Did you also that year buy tobacco in Louisville?

A. Yes, sir, in Louisville and Cincinnati both places. What we bought in Cincinnati we tried to get a warehouse in Maysville for but could not get insurance. We arranged for it in Louisville and had it shipped to Louisville from Cincinnati.

Q. 9. This tobacco that you bought did you have that in the same warehouse as your own tobacco at Millcreek?

A. This small crop I bought from the brake and owned a half interest in wasn't in the barn until late in the fall, but what I raised myself was in the barn at home there and the tobacco was
36 prized there. The tobacco we raised we housed ourselves.

Q. 10. What time in the year did you prize your tobacco?

A. It must have been along in December. It got so dry after I come from Louisville in September, the tobacco was so dry I could not do anything with it and we steamed it and took it down and loaded it once, but had to hang it up again and then we steamed and prized it. We had hay in the barn and the hay absorbed the dampness, and the tobacco didn't take it. But it was not house-burnt but it got very dry.

Q. 11. About the time you pooled it or subsequent to that what was the general understanding as to whether or not you were to prize the tobacco?

A. They talked to people they wanted to handle the tobacco and they did, when the time came offer to allow me to bid on prizing tobacco and they proposed to me they would let me prize it, but the pay was indefinite so I would not take hold of the job as I needed money, and as the time of paying was indefinite, I made no bid on it.

Q. 12. Did you consider you had a right to prize your own tobacco?

A. I surely did. I thought I had a right to prize it as I could prize it much better than any one else.

Q. 13. When you prized it did you keep out the types as the Equity Society did?

A. Yes, sir.

Q. 14. Did you ever have a man who had been working for the Equity and understood their system on prizing, help you
37 here?

Plaintiff objects to the question.

Q. 15. Who prized for you?

A. Jack Childs, who worked for the Equity and was considered an expert tobacco hand also. He knew the grades the Equity on each type.

Q. 16. What time in the year, if you can recollect, was the Equity pool sold out?

A. To the best of my recollection it was December.

Q. 17. December, 1908.

A. Yes, sir.

Q. 18. Did you have that tobacco at that time?

A. Yes, sir, I had it at home, it wasn't prized at that time, I prized it afterwards. They sold out before I prized the tobacco.

Q. 19. Up to that time did you have any purpose of selling the tobacco outside the Equity?

A. No, sir, none whatever.

Q. 20. Was it before or subsequent to that you had the conversation with Mr. Clark he related on the stand?

A. That was, I think, the latter part of December proba-ly Christmas week, or it may have been the very first days of January. It was along that time of the year he was there and looked at the tobacco. I invited him there to set it.

Q. 21. You knew at the time he was buying tobacco?

A. I never invited any one but Mr. Clarks to look at it,
38 and he agreed to take it by the types and wanted me to roll it in the warehouse, and have it reweighed, and he said he would pay me for it as soon as I did that.

Q. 22. Was there at that time any question either in your conversation, with Mr. John Clark, or your negotiations with the Maysville Warehouse Company, as to your compensation for prizing tobacco?

A. Mr. Clark said to me in the deal, I could not get anything for prizing the tobacco, nor any compensation for the hogsheads, and for that reason he could not afford to pay me for that part of the work. I would have to loose on that and he would give me as much for the tobacco and if I could get those charges allowed he would advance me that much on the price he was offering me.

Q. 23. When did you have a conversation with Mr. Shanklin?

A. That was just about Christman, or a day or two before or after that I had a conversation with Mr. Shanklin.

Q. 24. What did you discuss with him about it?

A. He drove in my place and tole me after calling me out, it was late in the evening, about dark, and said he understood I was

fixing to ship my tobacco, and he said he would rather I would deliver it to the warehouse in Maysville. I told him I hadn't whispered a word or told any one it was my intention to ship that tobacco and we talked for quite a while and he told me to come down and see Mr. Jim Kehoe, and he told me my arrangement I made with Mr. Kehoe would be satisfactory to the Board of Control of
39 Mason County.

Q. 25. Did you at that time discuss compensation for the prizing?

A. After he started to leave I said I understand they won't allow me anything for prizing or the hogsheads the tobacco was in, and he said "Pat they tell all kinds of stuff to people to keep up a commotion in the country."

Q. 26. You say Mr. Shanklin told you to see Mr. Jim Kehoe?

A. Yes, sir.

Q. 27. Did you go to see Mr. Kehoe as he instructed?

A. Yes, sir.

Q. 28. What did Mr. Kehoe say?

A. He would not consider making arrangements with me at all; he said he would not make arrangements with me but that he had arrangements with Mr. Shanklin. But he would not arrange with me to receive my tobacco.

Q. 29. Was it your intention when you went to Mr. Kehoe to deliver your tobacco?

A. Yes, sir, I wanted to turn it in some place for I needed money then.

Q. 30. Was it your intention when you talked to Mr. Shanklin to turn your tobacco in?

A. Yes, sir, I was ready along about that time, the latter part of the year. During Christmas week they concluded on opening up a few hogsheads to see if they would accept the tobacco, without inspecting the entire lot, and he would like me to have mine in at that time, he said as mine would have to be inspected to see whether the tobacco throughout was as good as the types made it out.
40 Q. 31. Subsequent to Mr. Kehoe's refusal to receive the tobacco did you ship it anywhere?

A. Yes sir, I shipped it.

Q. 32. Where?

A. To Cincinnati.

Q. 33. Did you have any intention, when you shipped it to Cincinnati, of taking out of the Equity?

A. No sir, it was my calculation to have sample men put it through over there. I owned a lot of tobacco that was stored there in the Warehouse belonging to the Equity, in 1906 and 1907 and along during the year at any time they sampled the tobacco out of the Warehouse there.

Q. 34. By shipping out there could you get advancements from the Warehouse you had been dealing with for the tobacco?

A. Yes sir, I could have got some money whether I dealt with them or not. They would have given me money on the first shipment.

Q. 35. You said that you were very well acquainted with a great many of the tobacco men in Louisville?

A. Yes sir, a number of fellows out of different parts of Kentucky, ship their tobacco there, and borrow money on it, and it was delivered to the different factories from the Warehouses. Any one that bought the tobacco, ordered it up there and had it inspected.

Q. 36. What was the case in regard to a good deal of tobacco from the Western end of Mason County?

A. Plaintiff objects to the question; the court sustains the
41 objection to which defendant excepts.

Q. 37. State whether or not you know, if you know, that much of the Equity tobacco from the state of Kentucky and some from Mason County was shipped to Cincinnati and held there and afterwards delivered to the Equity Society?

Plaintiff objects to the question; the court sustains the objection to which defendant excepts.

Cross-examination by M. J. HENNESSEY:

Q. 1. Mr. Collins you say you pooled about fifteen acres of your 1907 crop?

A. It was even fifteen acres.

Q. 2. Was that pooled before the tobacco had been cut from the ground and while it was growing, when was the contract signed?

A. I do not think anything was doing about the tobacco business about the time that was signed.

Q. 3. You signed fifteen acres?

A. Yes sir, that was the usual crop we raised and I expected to raise that much that year but I only raised eleven acres as near as I can say. I raised, the boys and I about six acres ourselves and a colored man there named Jim Williams, raised about five.

Q. 4. Then about eleven acres all told was raised upon your farm in the year of 1907?

A. Yes sir.

42 Q. 5. In addition to that you say that you purchased some crops that year?

A. Yes sir.

Q. 6. About how many did you purchase?

A. Do you mean in the country here? We bought largely in Cincinnati and Louisville that year, and out here I bought several crops, I do not know just how many, I suppose *and* half dozen.

Defendant object- to the question and answer, the court sustains the objection, to which plaintiff excepts.

Q. 7. Did you ship all the tobacco you prized in your barn to Cincinnati that year?

A. No sir, not all of it.

Q. 8. Did you ship a portion of it to Louisville?

A. Yes sir.

Q. 9. What portion did you ship to Louisville?

Defendant objects to the question: the court sustains the objection to which plaintiff excepts.

Q. 10. Is it or not a fact that a portion of this tobacco which was produced upon your farm was shipped to Louisville instead of Cincinnati?

A. No sir, it was shipped to Cincinnati.

Q. 11. What date was it shipped to Cincinnati?

A. February third.

Q. 12. How many hogsheads?

A. With this other crop included there were eleven hogsheads.

43 Q. 13. Do you mean the crop you raised on the farm?

A. No sir, 3,300 pounds we raised on the farm was with this tobacco.

Q. 14. You combined the two crops and shipped them together?

A. Yes sir.

Q. 15. To whom did you ship them in Cincinnati?

A. They were billed to T. H. Kirk, he was a tobacco handler there.

Q. 16. Proprietor of a warehouse in Cincinnati?

A. No sir a broker.

Q. 17. He bought and sold upon the brakes and hadn't a warehouse himself?

A. No sir.

Q. 18. To whom did you sell the tobacco?

A. T. H. Kirk, and it was put in the Globe warehouse, after I went there I shipped it to him and was going to decide where to put it afterwards but I sold it to the man to who it was billed finally.

Q. 19. How soon after you shipped it did you go to Cincinnati?

A. About ten days after.

Q. 20. How soon was it sold after you got there?

A. I do not remember how soon, but I tried to sell it to several different parties privately. If you ship it to a warehouse you have to sell it to the warehouse.

Q. 21. When did you finally sell it, on that trip?

A. Not on the first trip.

Q. 22. How long was it that you sold it after you shipped it?

44 A. About the twenty-second of February.

Q. 23. That is nineteen day- after you shipped it?

A. Yes, I think it was.

Q. 24. What did you receive for it?

A. $17.00 a hundred all round.

Q. 25. Was it sold privately to Mr. Kirk or over the brakes?

A. Privately.

Q. 26. Did you receive consent from the Mason County Board of Control or Burley Society to ship that tobacco to Cincinnati and sell and dispose of it?

A. No sir, I didn't.

Q. 27. Did any person connected or afterwards connected with the Mason County Board of Control or Burley Tobacco Society, of

Winchester, authorize you to ship that tobacco out of Mason County to T. H. Kirk to sell and dispose of it in Cincinnati?

A. No sir.

Q. 28. Did they authorize you to either ship or sell it?

A. No sir.

Q. 29. What local papers did you take?

A. The Mason Independent and Lexington Herald.

Q. 30. During the year 1908, what local papers did you take, what Maysville papers?

A. In 1908 I don't think I took any Maysville papers.

Q. 31. Neither the Bulletin or Ledger?

A. No sir.

Q. 32. Did you receive any notice or know the Mason County Board of Control had directed the tobacco which had been
45 pooled to be shipped to the Mason County Warehouse Company?

A. No sir, I never got any notice individually and never saw any.

Q. 33. Didn't you know that order had been published?

A. No I never saw it — any papers and no one told me of it.

Q. 34. You didn't know they were ordering the Equity tobacco delivered down here in Maysville?

A. Well I had kind of an idea they wanted it, but no one gave me that sort of information until Mr. Shanklin came along.

Q. 35. And that was the first time you knew they wanted the tobacco shipped to Maysville?

A. He didn't say it was necessary to bring it in at once, but that it would be best.

Q. 36. Was it before or after the sale of that tobacco that Mr. Shanklin said that, was that before the sale of the pooled or after?

A. After the sale of the pooled tobacco. It was early in December, 1908, when the Equity tobacco was sold and this was just along about Christmas, a day or two before or after, along about the twenty-fifth but not exactly that day.

Q. 37. You knew when the tobacco was sold, didn't you read of it in the papers, that the pooled Burley Tobacco had been sold?

A. Yes sir, I knew that.

Q. 38. Do you remember what it was sold at?

46 A. Yes sir.

Q. 39. What was it?

A. $17.00 for 1907 and $15.00 for 1908.

Q. 40. You also knew when that tobacco was sold to organization — wanted the tobacco delivered didn't you?

A. I don't know; it looked to me as if they had more than — could sell then they had to make a re-sale.

Q. 41. They didn't make a re-sale at that time?

A. No sir.

Q. 42. And the re-sale was the tobacco that had been injured, that the independents refused to accept after buying?

A. Yes sir.

Defendants objected to the question; the court overrules the objection, to which defendant excepts.

Q. 43. Why didn't you arrange to deliver your tobacco before Mr. Shanklin came to see you about it?

A. In fact, I could not get is prized. I only had it prized a few days when Mr. Clark came out and looked at the tobacco, and I concluded to sell it to Mr. Clark. The pool of the Equity had at that time sold out but I had some doubts as to when they would settle and wanted to turn it over to Mr. Clark, for the money.

Q. 44. You say the reason you didn't deliver it was because you could not get it prized?

A. Yes sir, I let it go to- long. If I had gotten it done in the spring I could have delivered it during the summer early but this tobacco was hung thin in the barn and got dry and we had
47 to steam it.

Q. 45. When did you prize it?

A. In December.

Q. 46. It had been prized then before Mr. Shanklin came to see you about it?

A. Yes sir.

Q. 47. You could have delivered it after you got it prized couldn't you?

A. Yes sir, but I wanted to sell it out there and deliver it here, when I sent the hogsheads away, they expected me to send the types with it, and I wanted to sell the tobacco there in the barn where I I had the types. They wanted the types sent to Winchester, and I would not in that case been able to sell that tobacco until it was sold by the Board.

Q. 48. When Mr. Shanklin came to see you he didn't authorize you to dispose of this tobacco in any way?

A. He said to see Mr. Kehoe, and whatever he did would be alright.

Q. 49. And you say Mr. Kehoe refused to do anything?

A. Yes sir.

Q. 50. You say you shipped this tobacco with the intention of putting it with Equity tobacco in Cincinnati and selling it then?

A. Yes sir.

Q. 51. Who did you consult there?

A. I shipped to Kirk, so I could consult any one I pleased.

Q. 52. Thee Kirk is a tobacco broker himself isn't he?
48 A. Yes sir.

Q. 53. When you got down there did you find any other Equity tobacco in before?

A. Yes sir.

Q. 54. Did you consult anyone about storing your tobacco there and letting it be sold through the Equity Society?

A. Yes sir.

Q. 55. And all you did was to go down and endeavor to sell it to Thee Kirk direct; did you attempt to sell through the agents of the Equity Society of Cincinnati or elsewhere?

A. No sir. I wanted to get my money out of it.

Q. 56. You said you shipped it to put it with Equity tobacco in Cincinnati?

A. Yes sir.
Q. 57. Did you make any attempt to do that?
A. Yes sir, while it was in the warehouse there.
Q. 58. Was there any other Equity tobacco in the warehouse?
A. Yes sir.
Q. 59. Did you consult any one about selling through the Equity Channels?
A. No sir.
Q. 60. And you went down soon after shipping to Thee Kirk, and sold the tobacco to him?
A. Yes sir.

49 Redirect examination:

Q. 1. The Equity had already been sold at the time you shipped this tobacco down there hadn't it?
A. They were inspecting it and had been doing it for almost a year.

And further saith not Patrick Collins.

This was all the evidence in the case.
Thereupon at the close of all the evidence the defendant moved the court to peremptorily instruct the jury to find a verdict for defendant, which motion plaintiff objected to and the court sustained said objection and overruled the motion of the defendant to which the defendant Patrick Collins objected at the time and still objects. Thereupon the Commonwealth requested the court to give the jury the following instructions, being number 1 and number 2.

Instruction No. 1.

"The court instructs the jury that if they believe from all of the evidence beyond a reasonable doubt that the defendant Patrick Collins, in this county, at any time within twelve months last past, before the finding of this Indictment, herein, did unlawfully, and knowingly take haul and remove out of and from said Mason County Kentucky, the tobacco crop described in the indictment and proof herein, with a fraudulent intent at the time to sell
50 and dispose of said tobacco in violation of a pooling contract pooling same and did subsequent thereto, and in pursuance of said removal, wilfully and knowingly sell and dispose of said tobacco to Theodore Kirk, and that said tobacco was at the time of its removal and sale pooled tobacco, theretofore, and then by written contract of the said Patrick Collins with agents pooling said crop, tobacco growers pledged to the Burley Tobacco Society and the Mason County Board of Control, as agents for the purpose of classifying, grading, storing, holding, selling and disposing of same and for the purpose of obtaining better prices for same, and that said removal, taking, hauling, out of said County and said sale, if any sale and removal there was, was without the written consent of said agents, or either if them and with a fraudulent intent to violate said contract of the said Patrick Collins with agents pooling said crop,

if any contract there was, then the jury should find the defendant guilty as charged in the indictment and fix his punishment in a fine in any amount not exceeding Two Hundred and Fifty Dollars in their discretion."

Instruction No. 2.

"Unless the jury believe from all the evidence beyond a reasonable doubt that the defendant has been proven guilty, they shall find him not guilty."

51 To the giving of which instructions and each of them defendant objected, and the court overruled the defendant's objection and gave said instructions, to which defendant excepted. The court then gave instruction No. 3, which is as follows:

Instruction No. 3.

"If the jury believe from all the evidence that the defendant in good faith offered to deliver the tobacco in question in accordance with the directions of the Board of Control *of* the Burley Tobacco Society, and the Warehouse Company to which he was directed to deliver it, refused to accept *a*t, then it is the duty of the jury to find the defendant not *f*uilty."

The defendant thereupon offered the following instructions:

"Unless the jury believe from all the evidence that the defendant Pat Collins sold or disposed of the tobacco in question in Mason County, Ky., then it is their duty to find the defendant not guilty.

The Court refused to give said instruction, to which refusal of the court the defendant excepted and still excepts.

These were all the instructions to the jury that were given asked or refused.

Thereupon said case being submitted to the jury, the jury retired and afterwards returned into the court the following verdict, to-wit.

52 "We the jury find the defendant guilty and fix his fine at One Hundred and Fifty Dollars."

(Signed) By J. S. POGUE, *Foreman.*

And thereupon the defendants on 7 day of Sept., and within three days from the rendition of said judgment and verdict, filed his motion and grounds for a new trial herein, which motion on — day of —— was overruled by the court, to which ruling the defendant objected and excepted and prayed an Appeal to the Court of Appeals, which was granted.

For said motion and grounds for a new trial see page No. —.

Thereupon the defendant Patrick Collins presents to the court this Bill of Exceptions, accompanied by said official transcript of evidence, and the same are approved and signed by the court, and are filed as part of the record herein for use in the Court of Appeals.

C. D. NEWELL.
Judge Mason Circuit Court.

STATE OF KENTUCKY,
Mason Circuit Court:

I James B. Key, Clerk of the Mason Circuit Court, do hereby certify that the foregoing and annexed 38 pages contain a full, true and complete transcript of the record and proceeding- had in
53 said court in the case therein mentioned.

JAS. B. KEY, *Clerk.*

Fee for record $11.90.

54 *Index.*

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55 Be it remembered, that on the 2nd day of January, 1911, at a Court of Appeals held in the Capitol, in Frankfort, the following order was entered:

COLLINS
v.
COMMONWEALTH.

Mason.

On the call of the docket it is ordered that the above case be and the same is submitted.

56 Be it remembered, that on the 13th day of January, 1911, at a Court of Appeals held in the Capitol, in Frankfort, the following judgment was entered:

PATRICK COLLINS, Appellant,
vs.
COMMONWEALTH, Appellee.

Appeal from Mason Circuit Court.

The Court being sufficiently advised, it seems to them that there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed, which is ordered to be certified to said Court.

It is further considered that appellee recover of appellant all its costs herein.

And on said date the Court delivered the following opinion:

56*a* Court of Appeals of Kentucky.

JANUARY 13, 1911.

PATRICK COLLINS, Appellant,
vs.
COMMONWEALTH, Appellee.

Appeal from Mason Circuit Court.

Opinion of the Court by Judge Settle.

This is an appeal from a judgment of the Mason circuit court entered upon a verdict finding the appellant guilty under an indictment and inflicting upon him a fine of $150.00, for selling and disposing of a crop of pooled tobacco in violation of section 3941*a*, Kentucky Statutes.

It appears from the allegations of the indictment that appellant, together with other tobacco raisers of Mason county, by a written contract made, as authorized by the statute, supra, with the Burley Tobacco Society and the Mason County Board of Control, its authorized agent selling for Mason County, consigned to and pooled with such society and its agent, their crops of burley tobacco
57 raised in the year 1907; their object in entering into the contract being to realize fairer and more remunerative prices for the tobacco than could be obtained from separate sales of it by the owners. The contract in question is set out in the indictment. It constituted the Burley Tobacco Society and the Mason County Board of Control, the agents of the tobacco growers signing the contract to receive, grade and sell the tobacco pooled, and obligated the latter not to themselves sell or dispose of the tobacco pooled without the consent of the agents so appointed to receive, grade and sell it.

It was further alleged in the indictment that under and by virtue of the contract in question appellant consigned to and pooled with the Burley Tobacco Society and Mason County Board of Control, 14,000 pounds of burley tobacco raised by him on his farm in the year 1907; that in violation of the contract and the statute authorizing it, he unlawfully and wilfully sold and disposed of the tobacco thus pooled by him "by moving, taking and shipping said tobacco out of said Mason County, to some place or point unknown to the grand jury, and there selling and unlawfully disposing of same to some person, firm or corporation unknown to the grand jury," and that such sale and disposal of the tobacco was without the consent of the agents empowered by the contract to sell it.

58 It is insisted for appellant that the trial court should have sustained the demurrer filed by him to the indictment, or in any event sustained his motion, made after the introduction of all the evidence, for a peremptory instruction directing his acquittal by the jury. The first of these contentions rests upon the ground that the indictment failed to lay the venue of the offense charged in Mason County, or at all; and the second, upon the ground that the evidence, as claimed, proved the sale of the tobacco in the City of Cincinnati, State of Ohio, therefore, the Mason Circuit Court had no jurisdiction of the offense.

The first contention cannot be sustained because the indictment shows on its face that it was found and returned by the grand jury of Mason County, and it charged that "the said Patrick Collins on the — day of —— 1909, and on other days before and since, within eight months last past and before the finding of this indictment, in the county aforesaid (Mason County,) did unlawfully and knowingly sell and dispose of a crop of pooled tobacco, to-wit: about 14,000 — of tobacco grown in the year, 1907, by Patrick Collins, on the farm of said Collins in said Mason County * * *." It will be observed that the indictment does lay the venue in Mason County.

59 It is argued, however, that as it also alleges that appellant effected the sale "by then and there moving, taking and shipping said tobacco out of said county, to some place and point unknown to the grand jury and there selling and unlawfully disposing of same to some person, firm or corporation unknown to the grand jury * * *" this language contradicted the previous allegation fixing the venue in Mason County and shows, as did the evidence introduced on the trial, that the offense was committed elsewhere. This argument must fail, if the acts by which appellant disposed of the pooled tobacco, constituted a violation of the pooling contract in Mason County and therefore a disposal, in the meaning of the statute, of the tobacco in that county.

The gist of the offense lies in the violation of the pooling contract allowed by the statute, the penalty for which may be found in sub-section 3 of section 3941*a*, which provides:

"For any breach or violation of any contract entered into or for the purposes set out in the foregoing sections, the injured party may recover the damages sustained by him by reason of such violation

f such contract of the person violating the same, and also of any erson who shall induce or persuade another to violate such contract, which damages shall include the reasonable expense and attorney's fees incurred by the injured party in prosecuting an action to recover such damages, or to prevent a violation of such contract, if the party complaining shall succeed in oing so, which may be recovered in the same action or original roceeding. Said agent when so selected as herein provided shall ave the sole right to sell said crop so pooled or combined, and it hall be unlawful for any owner of such crop to sell or dispose of ame and for any person to knowingly purchase the same without he written consent of such agent, and upon conviction thereof he r they shall be fined in any sum or amount not exceeding $250.00 or each offense, to be fixed by the jury in their discretion."

The contract by which appellant pooled his tobacco was made n Mason County and the Burley Tobacco Society and Mason County Board of Control, consignees and agents appointed to sell he tobacco, were and are in that county. By removing the pooled obacco from that county and selling it elsewhere without the consent of the selling agents, appellant violated the pooling contract o the injury of other growers of tobacco who had entered the pool pon the faith of his being a member. Indeed, the mere removal f the tobacco from Mason County by him without the consent of he selling agents and with the intent on his part to sell it without their consent in violation of the pooling contract, was a disposal of it within the meaning of the statute. The actual sale of the tobacco in Cincinnati was a mere incident or ulminating act of the transaction, furnishing conclusive evidence f the fraudulent intent with which he removed the tobacco from Mason County. The act of removal without the consent of the selling agents put it out of their power to grade or sell the tobacco as provided by the pooling contract, and as the removal of it by appellant was with the intent to sell it in violation of the pooling contract, he thereby unlawfully disposed of it, even before the act of sale, within the meaning of the contract; and in so doing subjected himself to the statutory penalty. If appellant removed the tobacco from Mason County with the fraudulent intent to sell it himself without the consent of the selling agents of the pool and then gave it away, threw it into the Ohio River, or burned it, it would have been an unlawful disposal of it within the meaning of the statute.

Section 21 Criminal Code provides:

"If an offense be committed partly in one county and partly in another county, or if acts and their effects constituting an offense occur in different counties, the jurisdiction is in either."

Manifestly, the acts constituting in large part the offense committed by appellant and also the effects thereof, occurred in Mason County.

Section 1358, Kentucky Statutes, declares:

"If any person shall fraudulently sell, conceal or dispose of any personal property on which there is at the time a mortgage of record, with the intent to prevent the enforcement of the lien

thereon, or the foreclosure of the mortgage and sale of the property, he shall be fined not less than ten, nor more than one thousand dollars, and imprisoned not less than fifteen nor more than twenty days, or both so fined and imprisoned."

If one should offend against this statute by removing mortgaged property from the county where it is situated or where the mortgage is recorded, and fraudulently sells, conceals or otherwise disposes of it in another county, would it be seriously contended that the court of the county from which the property was removed, equally with that of the county in which it was sold, would not have jurisdiction of the offense? Surely not. The same rule would apply where the mortgaged property is removed from a county in this state and carried to and sold or otherwise disposed of in another state.

In our opinion the grand jury of Mason County had jurisdiction to indict, and the Mason Circuit Court jurisdiction to try, appellant for the offense in question, therefore, the court did not err in overruling appellant's demurrer to the indictment, or in refusing the peremptory instruction asked by him.

63 The opinion in O'Banion vs. Commonwealth, 113 S. W., 907, relied on by appellant, does not conflict with the conclusions herein expressed. It is true the indictment in that case charged an unlawful sale in Cincinnati of tobacco he had pooled in Owen County, this state, but as the pooling contract allowed him to take the tobacco to that city for storage before its sale by the Burley Society, it was properly held that its sale by him in violation of the pooling contract was an offense committed wholly in another state of which the circuit court of Owen County had no jurisdiction. But in the case at bar the pooling contract did not permit the appellant to remove the tobacco from Mason County, and therefore, its removal therefrom by him was a violation of the contract and of the statute, amounting to a disposal of the tobacco, which made him amenable to the penalty therein prescribed. The two cases are not therefore analogous in point of fact or principle.

We must also reject appellant's final contention that the peremptory instruction should have been granted because the pooling contract introduced in evidence was not the one signed by him in pooling his tobacco. The contract in question seems to have been one intended for use, or that was used, by tobacco growers in Adams County, Ohio, but its provisions and language were ad-

64 mittedly the same as the provisions and language of that signed by appellant. Whether the contract signed by him had been lost or misplaced, does not appear, but he did not object to the introduction of the contract used in evidence, hence, he could not do so after his conviction. There was, therefore, no such variance as authorized an acquittal.

We have not discussed the objections urged by appellant to the constitutionality of the statute under which he was indicted as the same objections were fully considered and answered by us in the cases of Commonwealth v. International Harvester Co., 131 Ky. 551, and Commonwealth v. Hodges, 137 Ky. 223, in which the constitutionality of the act was sustained.

Finding no cause for disturbing the verdict, the judgment is affirmed.

J. M. Collins, Worthington & Cochran, for appellant.
Jas. Breathitt, Att'y Gen'l; Tom B. McGregor, Ass't Att'y Gen'l, M. J. Hennessey, for appellee.

[Endorsed:] Jan. 13, 1911. Collins vs. Com'lth.

65 Be it remembered that on the 3rd day of February, 1911, at a Court of Appeals held in the Capitol, in Frankfort, the following order was entered:

COLLINS
v.
COMMONWEALTH.

Mason.

Came appellant by counsel and filed motion for thirty days additional in which to file petition for rehearing herein, which motion is submitted.
The said motion is as follows:

66 Kentucky Court of Appeals.

PATRICK COLLINS, Appellant,
vs.
COMMONWEALTH OF KENTUCKY, Appellee.

Now comes Appellant, Patrick Collins, and asks the Court for an extension of time of thirty additional days in which to file a petition and brief for rehearing in this cause.

J. M. COLLINS,
Attorney for Appellant.

67 Be it remembered that on the 7th day of February, 1911, at a Court of Appeals held in the Capitol, in Frankfort, the following ordere was entered:

COLLINS
v.
COMMONWEALTH.

Mason.

The Court being advised, appellant's motion for thirty days' extension to file petition for rehearing herein is sustained.

68 Be it remembered that on the 8th day of March, 1911, at a Court of Appeals held in the Capitol, in Frankfort, the folfowing order was entered:

COLLINS
v.
COMMONWEALTH.

Mason.

Came appellant by counsel and filed petition and moved the Court for a rehearing herein, which motion is submitted.

(The petition for rehearing is not copied into this record, as per agreement on file.—CLERK.)

69 Be it remembered that on the 15th day of March, 1911, at a Court of Appeals, held in the Capitol, in Frankfort, the following order was entered:

COLLINS
v.
COMMONWEALTH.

Mason.

The Court being advised, appellant's motion for a rehearing herein is overruled.

70 Be it remembered that on the 29th day of April, 1911, there was filed in the office of the Clerk of the Court of Appeals, an Assignment of Error, and which is hereto attached and is as follows:

71 Court of Appeals of the State of Kentucky.

STATE OF KENTUCKY ex Rel. PATRICK COLLINS, Plaintiff in Error,
vs.
COMMONWEALTH OF KENTUCKY, Defendant in Error.

Now comes said plaintiff in error and respectfully submits that in the record, proceedings, decision and final judgment of the Court of Appeals of the State of Kentucky in the above entitled matter there is manifest error in this, to-wit:

First. The court erred in holding that the provisions of Chapter 103*a* being § 3941*a*, Carroll's Kentucky Statutes, and being the Act of March 21, 1906, and the amendment thereto of March 13, 1908, of the general laws of the State of Kentucky for the year 1908 and subsequent are not in conflict with and in violation of the provisions of the 14th Amendment of the Constitution of the United States, for that the State of Kentucky by and through the provisions of said Chapter 103*a* assumes and seeks,

(1) To deprive the plaintiff in error and certain other citizens of the United States and of the State of Kentucky of rights, privileges and immunities secured to other citizens of the United States and said state;

(2) To deprive the plaintiff in error and other citizens of the United States of liberty and property without due process of law;

(3) To deprive and to deny to the plaintiff in error and certain citizens and persons within the jurisdiction of the State of Kentucky *of* the equal protection of the law.

Second. The court erred in holding that by the provisions of said act the plaintiff in error is not deprived of rights privileges and immunities secured to other citizens of the United States and the State of Kentucky, by the Federal Constitution and laws of the United States.

Third. The court erred in holding that by the provisions of said act the plaintiff in error is not deprived of liberty and property without due process of law.

Fourth. The court erred in holding that the provisions of the act do not deny to the plaintiff in error the equal protection of the law.

Fifth. The court erred in holding that the said act and the authority exercised thereunder, and thereby authorized to be exercised thereunder, is within the police powers of the Legislature of the State of Kentucky.

Sixth. The court erred in holding the provisions of said act making it unlawful for the plaintiff in error to ship his tobacco out of Mason County, or sell same without first obtaining the con-
72 sent of the American Society of Equity, or the Mason County Board of Control, to be within the police powers of the state.

Seventh. The court erred in holding the provisions of said act requiring plaintiff to procure said consent before shipping his tobacco to Cincinnati, O., or selling it there, not to be an abridgement of the inalienable and constitutional right of plaintiff in error to pursue a lawful avocation in a lawful way without interference by the state.

Eighth. The court erred in holding that the provisions of said act do not unlawfully discriminate between those engaged in producing, handling or selling "pooled tobacco" and those engaged in producing, handling or selling other personal property.

Ninth. The court erred in holding that the provisions of said act do not cast special burdens upon those engaged in producing, handling, or selling "pooled tobacco" in excess of those cast on persons producing, handling or selling other personal property or farm products.

Tenth. The court erred in holding that said act does not grant special and exclusive privileges to certain citizens which it denies to the plaintiff in error and to other citizens of the state.

Eleventh. The court erred in holding that the provisions of said act are uniform in their operation throughout the state upon all citizens of the state similarly situated, and that it does not deprive the plaintiff in error of the right to earn a livelihood in the pursuit of a lawful and harmless occupation and of the liberty of contract in reference to said business.

Twelfth. The court erred in holding that the provisions of said Chapter 103*a* are not in violation of Section 8, Article 1, of the Con-

stitution of the United States, which confers on Congress the exclusive power to regulate commerce among the several states.

Thirteenth. The court erred in holding that the provisions of said Chapter 103*a* are not in violation of the provisions of the Act of Congress of 2 day of July, 1890, commonly known as the "Sherman Anti-Trust Act."

Fourteenth. The court erred in ordering judgment to be entered assessing and confirming a fine against the plaintiff in error.

Fifteenth. The court erred in ordering judgment to be entered, and in entering judgment against the plaintiff in error.

WORTHINGTON & COCHRAN,
J. M. COLLINS,
Attorneys for Plaintiff in Error.

[Endorsed:] Filed Apr. 29, 1911. Napier Adams, C. C. A.

73 And on said date there was filed in the office of the Clerk of the Court of Appeals, a Writ of Error from the Supreme Court of the United States, and order allowing the writ and which is hereto attached, as follows:

74 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Court of Appeals of the State of Kentucky, Greeting:

Because of the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Court of Appeals of the State of Kentucky before you or some of you, being the highest court of law or equity of the soid states in which a decision could be had in the said suit between Patrick Collins and the Commonwealth of Kentucky, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision was against their validity, and wherein was drawn in question the validity of a statute of, and an authority exercised under said state on the ground of their being repugnant to the Constitution, treaties and laws of the United States, and the decision was in favor of such, their validity, and wherein was drawn in question the construction of a clause of the Constitution or of a treaty or a statute of, or a commission held under the United States, and the decision was against the title, right, privilege or exemption specially set up and claimed under such clause of said Constitution, treaty, statute or commission, a manifest error hath happened to the great damage of said Patrick Collins, as by his complaint appears, we, willing that error if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf do command you, if judgment be therein given, that then under your seal distinctly and openly, you send the record and proceedings aforesaid with all thing- concerning the same to the Supreme Court of the United States, together with this writ so that you have the same at Washington on the 29 day of May, 1911, in

the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Edward D. White, Chief Justice of the Supreme Court the 29 day of April, in the year of our Lord 1911.

[Seal 6th Circuit Court, Eastern Ky. Dis., U. S. of America.]

CHAS. N. WIARD,
Clerk United States Circuit Court,
Eastern Dist. of Ky., at Frankfort.

April 29, 1911.

Allowed by
J. P. HOBSON,
Chief Justice of the Court of Appeals of Kentucky.

[Endorsed:] Filed Apr. 29, 1911. Napier Adams, C. C. A.

75 And on said date there was filed in the office of the Clerk of the Court of Appeals, a Writ of Error Bond, and which is in words and figures as follows:

76 Know all men by these presents that Patrick Collins, as principal, and Thomas Malone, as surety, both of Mason County, Ky., are held and firmly bound unto the Commonwealth of Kentucky in the sum of Five Hundred Dollars ($500.00), to be paid to the said Commonwealth of Kentucky; to the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 29 day of April, 1911.

Whereas, the above named plaintiff in error, hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Court of Appeals of the State of Kentucky.

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute said writ of error to effect, and answer all costs and damages if he should fail to make good his plea, then this obligation shall be void, otherwise to remain in full force and effect.

PATRICK COLLINS.
THOS. MALONE.

STATE OF KENTUCKY,
County of Mason:

On this 29 day of April, 1911, before me personally appeared Patrick Collins and Thomas Malone, to me known to be the persons described in and who executed the foregoing bond, and each severally made oath that the said Patrick Collins was the owner of real and personal property, located in Mason County, Ky., of value in excess of the sum of Ten Thousand Dollars ($10,000.), and that

the said Patrick Collins is worth beyond his debts and exemptions more than the sum of $1,000. in property which would be subject to execution, and that the said Thomas Malone is the owner of real and personal property located in Mason County, Ky., of value in excess of the sum of Thirty Thousand Dollars ($30,000.), and that the said Thomas Malone is worth beyond his debts and exemptions more than the sum of $10,000., in property which would be subject to execution, and each of said parties acknowledged that the execution of the foregoing bond is his free act and deed.

JAS. B. KEY,
Clerk Mason Circuit Court.

The proceedings of this Court are stayed.

I hereby approve the foregoing bond and sureties this 29th day of April, 1911.

J. P. HOBSON,
Chief Justice Court of Appeals of the State of Kentucky.

77 And on said date there was filed in the office of the Clerk of the Court of Appeals, the original Citation, with proof of service endorsed thereon, and which is hereto attached as follows:

78 UNITED STATES OF AMERICA, *ss:*

To the Commonwealth of Kentucky and Hon. James Breathitt, Attorney General, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington within (30) thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Court of Appeals of the State of Kentucky, wherein State *of* ex rel. Patrick Collins is plaintiff in error, and the Commonwealth of Kentucky is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable J. P. Hobson, Chief Justice of the Court of Appeals of the State of Kentucky, this 29 day of April, in the year of our Lord one thousand nine hundred and eleven.

J. P. HOBSON,
Chief Justice of the Court of Appeals of the State of Kentucky.

Copy of the above citation received and accepted this 29 day of April, 1911, at the office of the attorney general of the State of Kentucky.

JAMES BREATHITT,
Attorney General.

[Endorsed:] Filed Apr. 29, 1911. Napier Adams, C. C. A.

79 COMMONWEALTH OF KENTUCKY,
The Court of Appeals, ss:

In obedience to the commands of the within writ of Error I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record and proceedings (except the petition for rehearing) in the case named in said Writ of Error, with all things concerning same,

In witness whereof, I have hereunto set my hand and affixed the seal of my office. Done at the Capitol in Frankfort, this the 12th day of May, 1911.

[Seal Kentucky Court of Appeals.]

NAPIER ADAMS,
Clerk Court of Appeals of Kentucky.

Endorsed on cover: File No. 22,707. Kentucky Court of Appeals. Term No. 35. Patrick Collins, plaintiff in error, vs. The Commonwealth of Kentucky. Filed May 27th, 1911. File No. 22,707.

Supreme Court of the United States

OCTOBER TERM, 1913

No. 35

Patrick Collins, ... *Plaintiff in Error,*

v.

Commonwealth of Kentucky, . . *Defendant in Error.*

IN ERROR TO THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR PLAINTIFF IN ERROR

STATEMENT

May it Please the Court:

This writ of error is prosecuted to reverse a judgment of the Court of Appeals of Kentucky rendered January 13, 1911, which affirmed a judgment of the circuit court of Mason county, Kentucky, (page 6 of transcript,) by which plaintiff in error was indicted and convicted for a violation of the statutes of Kentucky, making it a penal offense to sell pooled farm farm products, and fined $150.

The Kentucky statute under which the indictment and conviction were had is *Sec. 3941, Kentucky Statutes*, Carroll's edition, and is the Act of March 21, 1906, (Session Acts of 1906, Chapter 117,) as amended by Act of March 13, 1908, (Session Acts of 1908, Chapter 7, page 38.)

Said Act, as amended, reads as follows:

> "It is hereby declared lawful for any number of persons to combine, unite or pool, any or all of the crops of wheat, tobacco, corn, oats, hay, or other farm products raised by them, for the purpose of classifying, grading, storing, holding, selling or disposing of same, either in parcels or as a whole, in order or for the purpose of obtaining a greater or higher price therefor than they might or could obtain or receive by selling said crops separately or individually.
>
> "That contracts or agreements made or entered into by persons with each other, the object or intent of which is to unite, pool or combine all or any of the crops of tobacco, wheat, corn, oats, hay or other farm products, raised by such persons, for the purpose of classifying, grading, storing, holding, selling or disposing of said crops, or any of them, either in parts or as a whole, in order, or for the purpose of obtaining a better or higher price therefor than could or might be obtained by selling said crops separately or individually, are hereby permitted, and shall not, because of any such combination or purpose of said persons, be declared illegal or invalid.
>
> "Such persons so entering into such an agreement or contract as is set out in the foregoing sections are hereby permitted to select an agent or agents through or by or with whom said parties so entering into such agreement may classify, grade, store, hold, sell, or dispose of said crop, or any of them, and said agent or agents shall have the right to take, receive, hold, store, classify, grade, sell

or dispose of said crop so placed in said agreement, for the purpose of accomplishing the object of such combination or agreement between such principals, and contracts and agreements entered into by such agent or agents for the purpose of classifying, grading, storing, holding, selling or disposing of said crop so combined, united or pooled, either in parcel or as a whole, are hereby permitted, and shall not, because of any such combination or purpose of such original agreement of such principals so entering into said combination, or of such agent or agents, be declared illegal or invalid. All contracts heretofore made by any person or persons for the purposes set out in the foregoing sections are hereby declared valid, if otherwise legally binding on the parties. To prevent any breach or violation of any contract made for the purposes set out in the foregoing sections, a restraining order and writ of injunction may be issued by proper officer, as prescribed in the Civil Code of Practice.

"For any breach or violation of any contract entered into for the purposes set out in the foregoing sections, the injured party may recover the damages sustained by him by reason of such violation of such contract of the person violating the same, and also of any person who shall induce or persuade another to violate such contract, which damages shall include the reasonable expense and attorney's fees incurred by the injured party in prosecuting an action to recover such damages, or to prevent a violation of such contract, if the party complaining shall succeed in doing so, which may be recovered in the same action or original proceeding. Said agent when so selected as herein provided shall have the sole right to sell said crop so pooled or combined, and it shall be unlawful for any owner of such crop to sell or dispose of same and for any person to knowingly purchase the same without the written consent of such agent, and upon conviction thereof he or they

shall be fined in any sum or amount not exceeding $250 for each offense, to be fixed by the jury in their discretion."

The indictment alleged that plaintiff in error unlawfully sold and disposed of a crop of pooled tobacco in 1909, by shipping it out of Mason county, Kentucky, to some place unknown to the grand jury, and there selling it. (Page 3 of transcript.) The proof shows that plaintiff in error, after pooling his tobacco crop, shipped it from Mason county, Kentucky, where it was raised, to Cincinnati, Ohio, and there sold it; and that he so shipped and sold it, without the consent of the Burley Tobacco Society, a corporation which he and other poolers had selected as their agent to sell their tobacco, in accordance with the provisions of section 3 of said Act of 1906.

ASSIGNMENT OF ERRORS

First.—The court erred in holding that the provisions of chapter 103*a*, being section 394*a*, Carroll's Kentucky Statutes, being the Act of March 21, 1906, and the amendment thereto of March 13, 1908, of the general laws of the state of Kentucky for the year 1908 and subsequent, are not in conflict with and in violation of the provisions of the 14th Amendment of the Constitution of the United States, for that the state of Kentucky by and through the provisions of said chapter 103*a* assumes and seeks:

(1) To deprive the plaintiff in error and certain other citizens of the United States and the state of Kentucky of rights, privileges and immunities secured to other citizens of the United States and said state;

(2) To deprive the plaintiff in error and other citizens of the United States of liberty and property without the due process of law;

(3) To deprive and deny to the plaintiff in error and certain citizens and persons within the jurisdiction of the state of Kentucky of the equal protection of the law.

Second.—The court erred in holding that by the provisions of said Act the plaintiff in error is not deprived of rights and privileges and immunities secured to other citizens of the United States and the state of Kentucky, by the Federal Constitution and laws of the United States.

Third.—The court erred in holding that by the provisions of said Act the plaintiff in error is not deprived of liberty and property without due process of law.

Fourth.—The court erred in holding that the provisions of the Act do not deny to the plaintiff in error the equal protection of the law.

Fifth.—The court erred in holding that the said Act and the authority exercised thereunder, and thereby authorized to be exercised thereunder, is within the police powers of the legislature of the state of Kentucky.

Sixth.—The court erred in holding the provisions of said Act making it unlawful for the plaintiff in error to ship his tobacco out of Mason county, or sell same without first obtaining the consent of the American Society of Equity, or the Mason County Board of Control, to be within the police powers of the state.

Seventh.—The court erred in holding the provisions of said Act requiring plaintiff to procure said consent before shipping

his tobacco to Cincinnati, O., or selling it there, not to be an abridgement of the inalienable and constitutional right of plaintiff in error to pursue a lawful avocation in a lawful way without interference by the state.

Eighth.—The court erred in holding that the provisions of said act do not unlawfully discriminate between those engaged in producing, handling or selling "pooled tobacco" and those engaged in producing, handling or selling other personal property.

Ninth.—The court erred in holding that the provisions of said act do not cast special burdens upon those engaged in producing, handling or selling "pooled tobacco" in excess of those cast on persons producing, handling or selling other personal property or farm products.

Tenth.—The court erred in holding that said Act does not grant special and exclusive privileges to certain citizens which it denies to the plaintiff in error and to other citizens of the state.

Eleventh.—The court erred in holding that the provisions of said act are uniform in their operation throughout the state upon all citizens of the state similarly situated, and that it does not deprive the plaintiff in error of the right to earn a livelihood in the pursuit of a lawful and harmless occupation and of the liberty of contract in reference to said business.

Twelfth.—The court erred in holding that the provisions of said Chapter 103*a* are not in violation of Section 8, Article 1, of the Constitution of the United States, which confers on Congress the exclusive power to regulate commerce among the several states.

Thirteenth.—The court erred in holding that the provisions of said Chapter 103*a* are not in violation of the provisions of the Act of Congress of 2 day of July, 1890, commonly known as the "Sherman Anti-Trust Act."

Fourteenth.—The court erred in ordering judgment to be entered assessing and confirming a fine against the plaintiff in error.

Fifteenth.—The court erred in ordering judgment to be entered, and in entering judgment against the plaintiff in error.

ARGUMENT

In 1890 the Legislature of Kentucky passed an Act (section 3915, Kentucky Statutes) making it a penal offense for any person to become a member of, or party to, or in any way interested in, any pool, trust, combine, agreement, confederation or understanding with any other person, "for the purpose of regulating, or controlling, or fixing the price of any merchandise, manufactured articles, or property of any kind."

The Act of 1906 expressly permitted persons to combine, unite or pool, any and all crops of wheat, tobacco, corn, oats, hay or other farm products raised by them, for the purpose of obtaining a higher price therefor than they could obtain by selling said crops separately.

The 1908 amendment to the Act of 1906 made it a penal offense for any person who had thus pooled his crop, to sell said crop.

If these statutes were to be literally construed, it is palpably evident that all owners of property other than farmers were denied the equal protection of the laws, under the opinion of

this court in *Connelly* v. *Union Pipe Sewer Co., 184 U. S., 540.* It would hence result either that the Act of 1906 was invalid, or that said Act operated as a repeal of the Act of 1890.

The Court of Appeals of Kentucky recognized this situation; and in its opinion in *Commonwealth* v. *International Harvester Co., 131 Ky., 551*, it put a construction on the pooling Act of 1906 which left in force the Act of 1890 and the Act of 1906.

This construction was arrived at in this way: Section 198 of the Constitution of Kentucky makes it the duty of the legislature to pass laws to prevent all pools, trusts and combinations organized to depreciate any article *below* its *real* value, or to enhance its cost *above* its *real* value.

In its opinion in *Commonwealth* v. *International Harvester Co., 131 Ky., 551*, the Kentucky Court of Appeals held that the Act of 1906 should be construed as authorizing farmers to pool their crops to enhance its price, but not above its *real* value. It held further that the Act of 1906 must be construed in connection with the 14th Amendment of the United States Constitution, as construed in *Connolly* v. *United States Sewer Pipe Co., 184 U. S., 540;* and therefore that the Act of 1906 meant to give to *all* owners of property, whether farmers or not, the right to form pools in order to enhance the price of their property, but not above its *real* value; that, therefore, the Act of 1890 was valid in so far as it prohibited the formation of pools to enhance or depreciate the value of property, provided the intended enhancement should be not *above*, and the intended depreciation should be not *below*, the *real* value of the property pooled.

Thus it was reasoned out by the Kentucky court, in the *Harvester Co. case*, that the International Harvester Company might be convicted of a violation of the Act of 1890, not on the ground that it was illegal to pool, but that a pool to enchance the price of a product *above* its real value violated that Act; and in the present case that the plaintiff in error might be convicted of a violation of the Act of 1908, for refusing to remain in a pool, organized to enchance the value of leaf tobacco, for the reason that the indictment charged that the purpose of the pool was not to enhance the value of leaf tobacco *above* its *real* value.

It was expressly held in *Commonwealth* v. *International Harvester Co., 131 Ky., 571*, that the legislature of Kentucky did not intend, by the Act of 1906, to discriminate between farmers and other owners of property, but that its intent and purpose was to confer upon all owners of property the right to combine for the purpose of selling their property at a higher price, provided that the price they combined to sell it for did not exceed its *real* value.

How is it to be determined, under the Kentucky statute, whether a pool, or combination, or trust, is legal or illegal, formed for the purpose of enhancing the prices of commodities? The Kentucky court answers, in its opinion in that case, that it must be determined by considering whether the price of the commodity pooled, which the poolers were endeavoring to make it sell for, was its *real* value, or more than its real value. How is its real value to be fixed? The Kentucky court says, by determining what would have been its market value under normal conditions. How is it to be ascertained what would be the market value of a commodity under *normal conditions?*

The Kentucky court answers by evidence as to what the commodity would have sold for under ordinary, normal conditions unaffected by any combination of producers or dealers, *i. e.*, buyers or sellers, whose object is to create an abnormal condition in the market. In other words, the pivotal question to be determined in ascertaining whether a person has commited a crime under the Act of 1890 in entering into a pool, or under the Act of 1906–8 in withdrawing from a pool, is, not whether the pool was formed for the purpose of raising prices, or lowering prices, but was the price at which the poolers were endeavoring to sell, or buy, the commodity, higher or lower than what that price would have been, provided no endeavor had been made by any other set of poolers to raise or lower the price, and provided, further, that no other abnormal conditions existed which would naturally raise or lower the market price. What conditions are so abnormal as to raise or lower prices, the statutes of Kentucky do not describe, nor does the Court of Appeals put such a construction on the statutes as to make it throw any light on that subject.

The result is, that a man might be convicted for violating the Act of 1890 for entering into a pool to enhance the price of manufactured tobacco, above its real value, and again convicted, under the Act of 1906–8 for withdrawing from that pool, beeause another jury might think that, although the purpose of the pool was to enhance the price of manufactured tobacco, yet that the price that the poolers were endeavoring to advance it to, was not higher than its real value, or rather, was not higher than what its market value would have been, in case there had been no abnormal conditions to raise or lower its price.

Thus, under the pooling statutes of Kentucky, as construed by the Kentucky Court of Appeals, the guilt or innocence of a person, charged with a violation thereof, is made to depend upon the existence of something that is not susceptible of proof by evidence. This something is—what *would be* the market value of certain products under conditions other than those that exist. That something is not a *knowable* fact; and evidence, direct or circumstantial, could no more be introduced to prove it, than could evidence be introduced to prove what will be the market value of corn one hundred years from now. The fact to be proved in order to establish guilt or innocence, is not simply *difficult* to be proved by any evidence, direct or circumstantial, but *impossible* of proof. In truth, it would be more proper to say that guilt or innocence, under the Kentucky pooling statutes, does not depend upon a fact which is capable of being proved by evidence, but upon a *surmise* as to what would probably or possibly have been a fact, in the event other conditions had existed, than such as did exist when the alleged criminal act was committed.

Law is a rule of action prescribed by a sovereign for his subjects. It is a paradox, a contravention in terms, to say that a rule, which is not only unknown but unknowable, is law.

The Kentucky Court of Appeals, in above cited case, holds, in substance, that it is a question for a jury to decide, whether the price that poolers were trying to get was above or below the real value of the commodity they pooled; *i. e.*, whether the price they were trying to get was above or below what would have been the market value of the commodity under conditions that did not exist. But, in the nature of things, evidence is not admissible to prove something to be a fact,

which is unknowable. "It is certain that no court would listen to an attempted presentation of that which it considered not knowable." *1 Wigmore on Evidence, sec 1, note 2.*

What was the market value of an article, at a certain time in the past, is capable of proof. But what would have been its market value at that time, if conditions had been then different from what they actually were, is speculation and surmise.

A statute which makes the guilt of a person charged with crime hinge on something which is unknowable, violates the due process of law clause of the 14th Amendment to the Constitution of the United States.

On this ground we submit that the Kentucky statute, under which plaintiff in error was convicted, is invalid, and the judgment of the Court of Appeals of Kentucky is erroneous and should be reversed.

The Kentucky statutes, under which the judgment now under review was rendered, are in violation of the Sherman anti-trust Act and therefore void. The purpose of the Kentucky statutes, as construed by the Court of Appeals of Kentucky, is to legalize the pooling of farm products in order to enhance their price. It is true that this enhancement must be limited to the real value of the commodity. But the Act of Congress forbids the pooling of commodities that are subjects of interstate commerce. And the circumstance that the object of the pool was to enhance the price of the commodity only up to its real value, will not withdraw it from the inhibition of that statute. There is nothing in the Sherman Act that exempts from its inhibition contracts and combinations in re-

straint of interstate trade, entered into for the purpose of increasing the price of property up to its real value only, or down only to its real value.

The very purpose of the Kentucky statutes, and of the contract made pursuant thereto, which plaintiff in error is charged with having violated, was to restrain trade in leaf tobacco, in other words, to restrain the owners of such tobacco from selling it. The purpose, further was to monopolize the trade in leaf tobacco, by legalizing contracts between owners of it, not to sell it, but to appoint a common agent to sell it for them. This purpose is apparent on the face of the statute, and is declared by the Kentucky Court of Appeals in construing it in *Owen County Burley Tobacco Society* v. *Brumback*, *128 Ky.*, *137*, where it is said:

> "It is manifest that the real and in fact only object of the act was to enable the producers, by pooling and combination, to obtain better prices than they could get if they sold their products separately and as individuals, and the right to select, grade, store, and hold, is merely a means to the accomplishment of the chief end, which is to get a greater price. * * *
>
> "The end to be accomplished was to control, regulate, and fix the price, by placing all the crops in the hands of a central agent with power to hold them until a reasonable and adequate price could be obtained."

The same construction was put on these statutes in *Commonwealth* v. *Hodges*, *137 Ky.*, *233*, and in the present case.

Under the construction put on this Act by the Kentucky Court of Appeals in *Commonwealth* v. *International Harvester Co.*, *131 Ky.*, *551*, and *Commonwealth* v. *Hodges*, *137 Ky.*, *233*, all owners of any kind of products—whether farmers or

not,—are given the same rights to pool and monopolize that are given, in terms, by the Act to producers of farm products. So that, manufacturers of coal oil, (like the Standard Oil Company, and its constituent companies,) and manufacturers of tobacco, (like the American Tobacco Company, and its constituent companies,) are given the right, by the Kentucky statutes, to form pools and combinations for the purpose of enhancing the price of their commodities and monopolizing the trade therein, provided only that the price they combine to get is no more than the real value of their property.

The decision of this court in *United States* v. *Patten*, *226 U. S.*, *523*, is decisive of the present case. The only difference between the question presented in that case and the one in the present case, is, that in the present case the pool or corner in leaf tobacco was attempted to be legalized by the Kentucky legislature, whereas in that case the state of New York had not attempted to legalize the corner in cotton. But the commodity attempted to be cornered in this case is as much a subject of interstate commerce as was the commodity attempted to be cornered in that case. There the corner was to be conducted on the Cotton Exchange in New York, and here the corner was to be conducted in Kentucky, but the purpose of this corner, as well as the purpose of that corner, was to restrain any and all trade, interstate and intrastate, in the commodity cornered, and to prevent the selling of it and its passing into the channels of commerce, until a certain fixed price could be obtained for it. In the present case, plaintiff in error was convicted for transporting his tobacco from Kentucky into Ohio and there selling it.

Says this court in *United States* v. *Patten*, *226 U. S., 525:*

"The commodity to be cornered was cotton, a product of the southern states, *largely used and consumed in the northern states.* It was *a subject of interstate trade and commerce*, and through that channel it was obtained from time to time by the many manufacturers of cotton fabrics in the northern states. The corner was to be conducted on the Cotton Exchange in New York City, but by means which would enable the conspirators to obtain control of the available supply and to enhance the price *to all buyers in every market of the country.* This control and the enhancement of the price were features of the conspiracy upon the attainment of which it is conceded its success depended. Upon the corner becoming effective, there could be no trading in the commodity save at the will of the conspirators and at such price as their interests might prompt them to exact. And so, the conspiracy was to reach and bring within its dominating influence the entire cotton trade of the country.

"Bearing in mind that such was the nature, object and scope of the conspiracy, we regard it as altogether plain that by its necessary operation it would directly and materially impede and burden the due course of trade and commerce among the states and therefore inflict upon the public the injuries which the anti-trust act is designed to prevent. See *Swift & Co.* v. *United States*, *196 U. S., 375, 396–400; Lawe* v. *Lawler*, *208 U. S., 274; Standard Oil Co.* v. *United States*, *221 U. S., 1; United States* v. *American Tobacco Co.*, *Ibid., 106.* And that there is no allegation of a specific intent to restrain such trade or commerce does not make against this conclusion,

for, as is shown by prior decisions of this court, the conspirators must be held to have intended the necessary and direct consequences of their acts and cannot be heard to say the contrary. In other words, by purposely engaging in a conspiracy which necessarily and directly produces the result which the statute is designed to prevent, they are, in legal contemplation, chargeable with intending that result. *Addyston Pipe & Steel Co.* v. *United States*, *175 U. S., 211, 243; United States* v. *Reading Co.*, *226 U. S., 324, 370.*

We respectfully submit that the reasoning of that opinion is decisive of the present case. The state of Kentucky cannot make legal and valid a contract which an Act of Congress declares to be illegal and invalid. Nor can the state of Kentucky make the withdrawing from a contract a penal offense, when the laws of the United States makes the contract itself illegal and void.

The error of the Kentucky Court of Appeals in the present case and in the *Hodges case*, *137 Ky., 233*, was in assuming that a contract made between citizens of one state could not be a contract in restraint of interstate trade. This is a palpable misconstruction of the Sherman anti-trust Act. The contract or combination which that Act makes unlawful may be a contract between two parties who reside in the same state. But if its *purpose* be to restrain the making of other contracts be-

tween citizens of different states, then it is prohibited by that Act.

A reversal of the judgment of the Court of Appeals of Kentucky is respectfully asked.

E. L. Worthington

J. M. Rollins

Counsel for Plaintiff in Error.

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Supreme Court of the United States

PATRICK COLLINS, ... *Plaintiff in Error,*

vs.

COMMONWEALTH OF KENTUCKY, ... *Defendant in Error.*

IN ERROR TO THE COURT OF APPEALS OF KENTUCKY.

BRIEF FOR DEFENDANT IN ERROR.

May it please the Court:—

STATEMENT.

On March 31, 1909, the grand jury of Mason County, Kentucky, returned in the Mason Circuit Court, an indictment against plaintiff in error, Patrick Collins, charging him with the offense "of unlawfully and knowingly selling and disposing of a crop of pooled tobacco, without the consent of the authorized agent to sell and dispose of same", contrary to the Kentucky Statutes in such cases made and provided. (Pages 3 and 4 of Transcript of Evidence.)

To this indictment the defendant filed a demurrer, alleging, among other things, that the Statutes of Kentucky, under which the indictment was found, was in conflict with the Fourteenth Amendment to the Constitution of the United States, in that they denied the defendant

the equal protection of the laws and deprived him of his liberty and property, without due process of law and that such statutes were in violation of the interstate commerce clause of the Constitution of the United States and the Sherman Anti-Trust Act. The demurrer was overruled and a trial had which resulted in a verdict imposing a fine upon plaintiff in error of $150.00, and judgment was entered upon this fine. From this judgment an appeal was taken to the Court of Appeals of Kentucky, the court of last resort in that state, and on the 13th day of January, 1911, that court delivered an opinion affirming the judgment of the Mason Circuit Court. The opinion will be found on pages 29-30-31 and 32 of Transcript. 141 Ky., 564. From this judgment of affirmance the plaintiff in error has prosecuted an appeal by writ of error to this court.

The assignment of error contains fifteen grounds against the judgment of the Court of Appeals of Kentucky. In his brief, however, plaintiff in error, relies upon only two grounds. The first is that the standard fixed for determining the guilt or innocence of the defendant in a prosecution under the Kentucky Statutes, is so vague and indefinite as to render it impossible of proof, and a conviction under such statutes violates the due process of law provision of the Fourteenth Amendment to the Constitution of the United States. The second ground relied upon is that the statutes under which the conviction was had, are in violation of the Act of Congress of July 2, 1890, commonly known as the Sherman Anti-Trust Act, and are, therefore, invalid.

HISTORY OF KENTUCKY ANTI-TRUST LEGISLATION.

In order to arrive at a correct solution of the questions involved on this appeal, we think it advisable that there be presented a brief statement of the history of the Kentucky Anti-Trust Legislation.

It is a well known fact that Kentucky is an agricultural state, a large portion of its wealth being in farm lands. In this state, as in many others, certain combinations were formed by manufacturers by reason of which monopolies were established in certain manufactured articles, and the price of those articles were fixed to the users of same at a price greatly in excess of their actual value and greatly in excess of the price before the combination was formed. The users of those articles were compelled to buy, and compelled, by necessity to pay the price fixed. Combinations were also formed for the purpose of buying agricultural products, and the result was (and this applied mainly to tobacco) that the raisers of the products had but one purchaser. The consequence was that the agricultural products were, of necessity, sold at a price below their real value, and even at a price less than the actual cost of production. This condition resulted in serious injury to the State, in many cases forcing absolute bankruptcy upon its citizens.

To rid the State of this intolerable condition, its Legislature, prior to the enactment of the Sherman Anti-Trust Law, to-wit, on May 20, 1890, enacted what is known as the Kentucky Anti-Trust Law, which is contained in Section 3915-3921, inclusive, of Kentucky Statutes, Carroll's Edition. This statute, in substance, prohibited "any combination, trust or agreement for the

purpose of regulating, controlling or fixing the price of any merchandise, manufactured article, or property of any kind", and provided certain penalties for violation of this law. A new Constitution for Kentucky was adopted in 1891, and it also provided for the conditions still existing, by providing in Section 198, as follows:

> "It shall be the duty of the General Assembly from time to time, as necessity may require, to enact such laws as may be necessary to prevent all trusts, pools, combinations or other organizations, from combining to depreciate below its real value any article, or to enhance the cost of any article above its real value."

The Act of May 20, 1890, was not repealed nor in any manner affected by the Constitution of 1891, but remained in full force and effect, as was held by the Court of Appeals in case of Commonwealth v. Grinstead, 108 Ky., 59, and Commonwealth v. Inter-National Harvester Company, 131 Ky., 551. It was found that the Act of 1890 did not produce the results hoped; that those unlawful combinations still continued and the injury resulting from them was aggravated rather than decreased. The Legislature concluded to enable the producers of agricultural products to meet the combinations which were ruining them by permitting them to pool their products, and the Act of March 21, 1906, and an amendment to same of March 13, 1908 was adopted. Both Acts being amendments to the act of May 20, 1890.

Those acts, in substance, permit the raisers of agricultural products to pool same and to appoint an agent to sell the product for a fair and reasonable price, and punishes by fine, any person who contracts to put his

crops in a pool and in violation of his contract, sells his pooled crop, and punishes any person who buys a crop from other than the regularly appointed agent, knowing the crop to have been pooled.

The Court of Appeals of Kentucky in construing those various enactments, have held in Commonwealth v. International Harvester Company of America, 131 Ky., 571, and in numerous other cases, that the Acts of 1906 and 1908 were amendments to the Act of May 20, 1890, and that by virtue of those enactments, pools and combinations could be formed in Kentucky where the purpose and effect of the combination or pool was to sell the pooled property, manufactured or agricultural, at its real or market value, but it further held that if the pool or combination was formed for the purpose of, and did sell the property pooled for more than its real or market value or for the purpose of buying property at less than its real or market value, then such pool or combination was condemned by the Kentucky Statutes, and those found guilty of so doing, could be punished by fine.

In the case of International Harvester Company of America v. Commonwealth, 147 Ky., page 564, the Court of Appeals of Kentucky in discussing the effect of the decision in case of Commonwealth v. International Harvester Company of America, 131 Ky., 561, says:

> "Indeed, by the opinion in that case it was not only held that the sections, supra, (that is the Act of May 20, 1890 and March 21, 1906) were not in conflict with the Fourteenth amendment to the Federal Constitution, but that by construing section 3941a (act of March 21, 1906) as an amendment to section 3915 as was evidently intended by the Legislature, they could properly be and were harmonized. In effect the same conclusion had been arrived at by

the court in the case of Owen County Burley Tobacco Society v. Brumback, 128 Ky., 137.

"It may be said, that since these two cases were decided, there is no law in this State which forbids the existence of trusts, pools or combinations, or that prohibits them from fixing and maintaining the price or prices of their products or commodities so long as they are not sold for more or less than their real or market value."

By the amendment of March 13, 1908, it is provided that any person who is a member of a pool, and who sells his product outside of the pool is guilty of a misdemeanor, and if convicted, shall be fined not exceeding $250.00, and any person who knowingly purchases pooled property from one other than the agent of the pool, shall if found guilty, be punished in a like manner. The reason for imposing a fine, by criminal proceedings, against any one who violated the provisions of the pooling act in regard to selling or purchasing pooled property, was that many of the persons entering into the pool, particularly of agricultural products, were insolvent and could not be held financially responsible in damages for any injury sustained by violation of their pooling contract. It was believed that those organizations which had heretofore controlled the prices of agricultural products would endeavor to make the pooling of agricultural products unsuccessful, and one of the means so to do would be to induce members who were financially irresponsible, to sell their crops to one of those organizations and in that manner weaken or destroy the pool, and render ineffectual its purposes, and to meet that situation the criminal part of the act was added. See Owen County Board of Control v. Brumback, 128 Ky., 137, and Commonwealth v. Hodges, 137 Ky., 233, for history and reason for this legislation.

We insert Section 3915 of the Act of May 20, 1890, and the Acts of March 21, 1906 and of March 13, 1908, amendatory thereto. The remaining sections of the act of May 20, 1890, referred to the manner of prosecuting violations of section 3915 and we, not deeming them material to the questions here involved, do not insert them.

Section 3915 of the Kentucky Statutes is as fol lows:

> "That if any corporation organized under the laws of Kentucky, or under the laws of any other State or country, for transacting or conducting any kind of business in this State, or any partnership, company, firm or individual, or other association of persons, shall create, establish, organize or enter into, or become a member of, or a party to, or in any way interested in any pool, trust, combine, agreement, confederation or understanding with any other corporation, partnership, individual or person, or association of persons, for the purpose of regulating or controlling or fixing the price of any merchandise, manufactured articles or property of any kind, or shall enter into, become a member of, or party to or in any way interested in any pool, agreement, contract, understanding, combination or confederation, having for its object the fixing, or in any way limiting the amount or quantity of any article of property, commodity or merchandise to be produced or manufactured, mined, bought or sold, shall be deemed guilty of the crime of conspiracy, and punished therefor as provided in the subsequent sections of this act."

The Act of March 21, 1906, Ky. Stats., Section 3941a, is as follows:

"*Be it enacted by the General Assembly of the Commonwealth of Kentucky*:

"§ 1. It is hereby declared lawful for any number of persons to combine, unite or pool, any or all of the crops of wheat, tobacco, corn, oats, hay, or other farm products raised by them, for the purpose of classifying, grading, storing, holding, selling or disposing of same, either in parcels or as a whole, in order or for the purpose of obtaining a greater or higher price therefor than they might or could obtain or receive by selling said crops separately or individually.

"§ 2. That contracts or agreements made or entered into by persons with each other, the object or intent of which is to unite, pool or combine all or any of the crops of tobacco, wheat, corn, oats, hay, or other farm products, raised by such persons, for the purpose of classifying, grading, storing, holding, selling or disposing of said crops, or any of them, either in parts or as a whole, in order, or for the purpose of obtaining a better or higher price therefor than could or might be obtained by selling said crops separately or individually, are hereby permitted, and shall not, because of any such combination or purpose of said persons, be declared illegal or invalid.

"§ 3. Such persons so entering into such agreement or contract as is set out in the foregoing sections, are hereby permitted to select an agent or agents through or by or with whom said parties so entering into such agreements may classify, grade, store, hold, sell or dispose of said crops, or any of them, and said agent or agents shall have the right to take, receive, hold, store, classify, grade, sell or dispose of said crops so placed in such agreement as directed or authorized by their principal, for the purpose of accomplishing the obect of such combination or agreement between such principals, and contracts and agreements entered into by such agent or or agents for the purpose of classifying, grading, storing, holding, selling or disposing of said crops so combined, united or pooled, either in parcels or as a whole, are hereby permitted, and shall not, because of any such combination or purpose of such original agreement of such principals so entering

into said combination, or of such agent or agents, be declared illegal or invalid."

The Act of March 13, 1908, is as follows:

"*Be it enacted by the General Assembly of the Commonwealth of Kentucky*:

"§ 1. That section 3 of an act entitled, An Act permitting persons to combine or pool their crops of wheat, tobacco and other products, and sell same as a whole, and making contracts in pursuance thereof valid, approved March 21, 1906, being Chapter 117 of the Acts of the General Assembly of the Commonwealth of Kentucky for the year 1906, be and the same is hereby amended and re-enacted so as to read as follows:

"Such persons so entering into such an agreement or contract as is set out in the foregoing sections are hereby permitted to select an agent or agents through or by or with whom said parties so entering into such agreement may classify, grade, store, hold, sell, or dispose of said crops, or any of them, and said agent or agents shall have the right to take, receive, hold, store, classify, grade, sell or dispose of said crops so placed in said agreement, for the purpose of accomplishing the object of such combination or agreement between such principals, and contracts and agreements entered into by such agent or agents for the purpose of classifying, grading, storing, holding, selling or disposing of said crops so combined, united or pooled, either in parcel or as a whole, are hereby permitted, and should not, because of any such combination or purpose of such original agreement of such principals so entering into said combination, or of such agent or agents, be declared illegal or invalid. All contracts heretofore made by any person or persons for the purpose set out in the foregoing sections are hereby declared valid, if otherwise legally binding on the parties. To prevent any breach or violation of any contract made for the purpose set out in the foregoing sections a restraining order and writ of injunction may

be issued by proper officer, as prescribed in the Civil Code of Practice.

"For any breach or violation of any contract entered into for the purpose set out in the foregoing sections, the injured party may recover the damages sustained by him by reason of such violation of such contract of the person violating the same, and also of any person who shall induce or persuade another to violate such contract, which damages shall include the reasonable expense and attorney fee incurred by the injured party in prosecuting an action to recover such damages or to prevent a violation of such contract, if the party complaining shall succeed in doing so which may be recovered in the same action or original proceeding. Said agent when so selected as herein provided, shall have the sole right to sell said crops so pooled or combined, and it shall be unlawful for any owner of such crops to sell or dispose of same and for any person to knowingly purchase the same without the written consent of such agent, and upon conviction thereof, he or they shall be fined in any sum or amount not exceeding $250.00 for each offense, to be fixed by the jury in their discretion."

ARGUMENT.

By the construction placed by the Kentucky Court of Appeals upon those various enactments, any number of persons or corporations, whether engaged in agricultural pursuits or in manufacturing, or other business, may combine together for the purpose of selling the articles they own or control, at a fair market value and can combine for no other purpose. And this right, as heretofore said, is given all persons and corporations, irrespective of the character of business in which they are engaged. There is no discrimination made. All have the protection of the same law, and all are held responsible in the same manner to the same law. The act

discriminates against no person or corporation and gives no person or corporation any exclusive privilege or immunity.

By this construction, objections to such legislation as was pointed out by this court in Connolly v. Union Sewer Pipe Co., 184 U. S., 539, page 46 L. Ed., 679, are avoided, and that case is in no manner an authority against those enactments, and this is practically admitted by counsel for plaintiff in error in their brief.

In Orr v. Gillman, 183 U. S., 275, page 46 L. Ed., 196, this court in speaking of the construction placed upon a New York statute by a court of last resort in New York, says:

> "These views of the Court of Appeals must be accepted by us as accurate statements of the law of the State; and though it is claimed in the brief of counsel for the plaintiff in error that such a construction of the transfer tax law brings it into conflict with the 14th Amendment of the Constitution of the United States, we are unable to approve such a contention. The subject dealt with is one of state laws expounded by state courts. The laws and the construction put upon them apply equally to all persons in a like situation, and cannot be regarded as conflicting with the provisions of the Federal Constitution. Magoun v. Illinois Trust & Savings Bank, 170 U. S., 283, 42 L. Ed., 1037, 18 Sup. Ct. Rep., 594."

It is settled beyond controversy that this court will consider a state act in the light of the construction placed upon it by the court of last resort of the state, and while this court might differ with the state court as to the proper construction of the act as an original proposition, yet it is bound by the state court's construction. Elmendorf v. Taylor, 10 Wheaton, page 289; L. Ed., Orr v. Gillman, 183 U. S., 283.

For the reasons heretofore stated a fine was imposed upon any person who, having pooled his tobacco, sold same without the consent of the pool agent. It seems to us that this was not in any sense an arbitrary interference with private business or transactions, but was an endeavor to carry out the policy of the statute which was to enable the raisers of agricultural products to receive a fair price for same, and to prevent an excessive price being required for necessary articles, manufactured either in or outside of the State. Whether this policy meets the approval or disapproval of this court is not the question. The question is whether this is such an arbitrary interference with private business as to bring it within the prohibition of the Fourteenth Amendment of the Constitution of the United States.

In Otis & Gassman v. Parker, 187 U. S., page 47 L. Ed., 323, the following language was used by Mr. Justice Holmes on page 327 L. Ed. of the opinion:

> "It is true, no doubt, that neither a State Legislature nor a State Constitution can interfere arbitrarily with private business or transactions, and that the mere fact that an enactment purports to be for the protection of public safety, health, or morals, is not conclusive upon the courts. Mugler v. Kansas, 123 U. S., 623, 661; 31 L. Ed., 205, 210; 8 Sup. Ct. Rep., 273; Lawton v. Steele, 152 U. S., 133, 137, 38 L. Ed., 385, 388; 14 Sup. Ct. Rep., 499. But general propositions do not carry us far. While the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree. Considerable latitude must be allowed for difference of view, as well as for possible peculiar conditions which this court can know but imperfectly, if at all.

Otherwise a constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English speaking communities, would become the partisan of a particular set of ethical or economical opinions, which by no means are held *semper ubique et al omnibus.*

"Even if the provision before us shall seem to us not to have been justified by the circumstances locally existing in California at the time when it was passed, it is shown by its adpotion to have expressed a deep seated conviction on the part of the people concerned as to what that policy required. Such a deep-seated conviction is entitled to great respect. If the state thinks that an admitted evil cannot be prevented except by prohibiting a calling or transaction not in itself necessarily objectionable, the court cannot interfere, unless, in looking at the substance of the matter, they can see that it "is a clear, unmistakable infringement of right secured by the fundamental law."

And again in Chicago B. & Q. R. Co. v. McGuire, 219 U. S., 547, beginning on page 55 L. Ed., 339, the Supreme Court of the United States, through Mr. Justice Hughes uses the following language on page 339 of the opinion:

"The principles involved in these decisions are that where the legislative action is arbitrary and has no reasonable relation to a purpose which it is competent for government to effect, the Legislature transcends the limit of its power in interfering with liberty of contract; but where there is a reasonable relation to an object within the governmental authority, the exercise of the legislative discretion is not subject to judicial review. The scope of judicial inquiry in deciding the question of *power* is not to be confused with the scope of legislative considerations in dealing with the matter of *policy.* Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether in short, the legislative discretion was in its prescribed

limits should be exercised in a particular manner, are matters for the judgment of the Legislature, and the earnest conflict of serious opinions does not suffice to bring them within the range of judicial cognizance."

The principle was thus stated in McLean v. Arkansas, supra, pp. 547 and 548:

> "The Legislature, being familiar with local conditions, is, primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the Legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of the legislative power (Cases cited) * * * If there existed a condition of affairs concerning which the Legislature of the State, exercising its conceded right to enact laws for the protection of the health, safety or welfare of the people, might pass the law, it must be sustained; if such action was arbitrary interference with the right to contract or carry on business, and having no just relation to the protection of the public within the scope of legislative power, the act must fall."

STANDARD ADOPTED TO DETERMINE WHETHER OR NOT THERE HAS BEEN A VIOLATION OF THE KENTUCKY ANTI-TRUST LAW, IS FIXED AND CERTAIN.

It is objected by plaintiff in error that the standard fixed to determine the guilt or innocence of one charged with violating the anti-trust laws of Kentucky is impossible to be ascertained, and therefore any punishment inflicted under such statutes violates the due process clause of the Fourteenth Amendment of the Constitution of the United States.

The Statutes, as construed by the Court of Appeals, provide that if a combination is formed for the purpose of increasing the price of the article above its real value, then the combination is an illegal one. If the purpose of the combination is to depreciate the price of the article below its real value, then the combination is illegal. The standard fixed is the real value of the article. The real value, as stated by the Court of Appeals of Kentucky, International Harvester Company of America v. Commonwealth, 137 Ky., 551 and in same case 144 Ky., page 403, is the market value. How is the market value determined? By the value of the article upon an open market. Where there is no open market for a particular article by reason of combinations and agreements concerning same, how can the market value of such article be ascertained at such time?

The Court of Appeals of Kentucky in International Harvester Company of America v. Commonwealth, 137 Ky., page 551, and same case in 144 Ky., page 403, says the market value may be ascertained under such circimstances by first ascertaining the price before the combination in an open market. This is the market value. Then if after the combination, the price has been increased without a corresponding increase in the price of labor required in the manufacture or raising of the article, or a corresponding increase in the price of the raw material going into the article (if a manufactured product) and the business conditions are normal, then the increase in price is above the market value.

If the charge is that the price is below the market value, the standard is determined by finding whether there has been a decrease in the cost of labor, etc., corresponding with the decrease in price of the article and

whether the business conditions are normal. If there has been no decrease in price of labor, etc., and conditions are normal, then it may properly be concluded the price of the article is below its market value.

In this way the standard is definitely fixed and while as said in Commonwealth v. International Harvester Co., 131 Ky., 551, "Different juries might form different conclusions upon the same facts. What they might do is proverbially uncertain, nevertheless, the 'standard erected by law' is not uncertain."

Counsel for plaintiff in error is in error in contending that the market value of the article under conditions existing in the instant case is not a *knowable* fact.

KENTUCKY STATUTES DO NOT VIOLATE THE FEDERAL ANTI-TRUST ACT.

It is insisted that the Kentucky Statutes, under which was had the conviction of plaintiff in error, are in violation of the Federal Anti-trust Act, and, therefore, void. When it is kept in mind that the Kentucky Statutes only permit the pooling of manufactured articles, or agricultural products, for the purpose of obtaining the real or market value of same, and it is a violation of those statutes to pool for the purpose of obtaining a price in excess of the value of the article, or to depreciate the price below the value of the article, it seems a novel proposition to maintain that such statutes are violations of any Federal law. The very purpose of the Kentucky Statutes being to provide against the evils which are aimed at by the Federal Statutes.

This court in the case of the Standard Oil Company v. United States, 221 U. S., at page 58, 55 L. Ed., 664,

after having revieved the history of trust legislation in England, as well as in the United States, summed up its views of the common law and the legislation upon this subject, in the following language:

> "Without going into detail, and but very briefly surveying the whole field, it may be with accuracy said that the dread of enhancement of price and of the wrongs which it was thought would flow from the undue limitation of competitive conditions caused by contracts or other acts of individuals or corporations led, as a matter of public policy, to the prohibition or treating as illegal all contracts or acts which were *unreasonably restrictive of competitive conditions*, either from the nature or character of the contract or act or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the *legitimate purpose of reasonably forwarding personal interest*, and developing trade, but on the contrary, were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evil such as enhancement of prices, which were considered as against public safety. It is equally true that the survey of the legislation in this country on this subject from the beginning, will show, depending as it did upon the economic conceptions which obtained at the time the legislation was adotped or judicial decision rendered, that contracts or acts were at one time to be of such a character as to justify the inference of wrongful intent, which were at another period thought not to be of that character."

In defining the words "to monopolize" and "monopolize," this court in the same case, at page 61, used the following language:

"Undoubtedly the words 'to monopolize' and 'monopolize' as used in the section reach every act bringing about the prohibited result. The ambiguity, if any, is involved in determining what is intended by monopolize, but this ambiguity is really dispelled by the light of the previous history of the law of restraint of trade, to which we have referred, and the indication which it gi[illegible]f the practical evolution by which monopoly and the act which produces the same result as monopoly, that is, *undue restraint of the course of trade*, all come to be spoken of as, and to be indeed synonymous with, restraint of trade. In other words, having by the first section forbidden all means of monopolizing trade, that is, *unduly* restraining it by means of every contract, combination, etc., the second section seeks, if possible, to make the prohibition of the act all the more complete and perfect by embracing all attempts to reach the end prohibited by the first section, that is, restraint of trade by any attempt to monopolize, monopolization thereof, even though the act by which such results are attempted to be brought about, or are brought about, be not embraced within the general enumeration of the first section, and of course, when the second section is thus harmonized with and made, as it was intended to be, the complement of the first, it becomes obvious that the criterion to be resorted to to in any given case for the purpose of ascertaining whether violations of the section have been committed, is the *rule of reason* guided by the established law and by the plain duty to enforce the prohibition of the act, and thus, the public policy which its restrictions were obviously enacted to sub-serve."

Therefore, we find that this court has construed the Federal Statutes to mean undue restraint of trade, while the Kentucky courts have construed the statute in question to prohibit combinations which will increase property above its real value, or diminish it below its real value, or, in other words, that will unduly (as was said by this court) enhance the value of the article. Ap-

plying the rule of reason to the construction given the Kentucky Statutes by the Kentucky Court of Appeals, it is in harmony with the construction given to the Federal Statutes by this court.

Believing as we do, that the Kentucky Statute, as construed by the Kentucky Court of Appeals, is in harmony with the organic law of the State of Kentucky, and is also in harmony with the Federal law upon the same subject, and the construction given to the Federal law by this court, we respectfully ask the court to affirm the opinion of the Kentucky Court of Appeals.

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